Supreme Court, U.S.
FILED

05 1447 MAY 12 2006

OFFICE OF THE CLERK

No. 05-

In The

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, *Appellee,*

and

JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, *Intervenor-Appellees.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005-3096
202/756-8000
202/756-8087 (facsimile)

Counsel for Appellant

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Raeanna S. Moore
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)

Questions Presented

1. Whether the District Court erred in denying a preliminary injunction to allow The Christian Civic League of Maine, Inc. ("League") to continue broadcasting grass roots lobbying advertisements during the electioneering communication prohibition period ("the prohibition") imposed by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), codified at 2 U.S.C. § 441b, and in particular:

a. Whether the prohibition is narrowly tailored to a compelling governmental interest as applied to the League's proposed advertisement or violates the constitutional rights to free expression, association, and petition;

b. Whether the prohibition is narrowly tailored to a compelling governmental interest as applied to genuine grassroots lobbying generally or violates the constitutional rights to free expression, association, and petition;

c. Whether the League meets the requirements for a preliminary injunction by being denied the opportunity to use corporate funds for its proposed communication.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

The Christian Civic League of Maine, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

Notice of Statutory Expedition & Advancement on the Docket

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), 116 Stat. at 114, App. 20a.

Table of Contents

Questions Presented ..... (i)

Parties to the Proceedings ..... (ii)

Corporate Disclosure Statement ..... (ii)

Notice of Statutory Expedition & Advancement on the Docket ..... (ii)

Table of Contents ..... (iii)

Appendix Table of Contents ..... (v)

Table of Authorities ..... (vi)

Introduction 1

Opinions Below 3

Jurisdiction 3

Constitutional & Statutory Provisions 3

Statement of the Case 4

The Questions Presented Are Substantial 11

I. The League Has Likely Success on the Merits. ... 12

A. An Exception for Genuine Grassroots Lobbying Is Constitutionally Required. 13

1. The Constitution Protects Grassroots Lobbying. 13

2. Grassroots Lobbying Is Not Electioneering. 17

a. There Is a Distinction Between Grassroots Lobbying and Electioneering. . . . 17

b. Genuine Grassroots Lobbying Is No Sham. 20

c. Grassroots Lobbying Does Not Implicate *McConnell*'s Concerns. 22

3. The League's Ad Is Not Electioneering. . . 25

B. The District Court's Analysis Is Flawed. 26

II. The League Will Suffer Irreparable Injury. 28

III. An Injunction Harms No Other Parties. 28

IV. An Injunction Is in the Public Interest. 29

Conclusion 30

Appendix

Memorandum Opinion 1a

Order 14a

U.S. Constitution, First Amendment 15a

2 U.S.C. § 434(f)(1)-(3) 15a

2 U.S.C. § 441b(a)-(b)(2) 18a

BCRA § 403 . . . . . 20a

11 C.F.R. 100.29 ..... 21a
11 C.F.R. 114.2(a)-(b) 27a
11 C.F.R. 114.14 ..... 28a
Notice of Appeal to U.S. Supreme Court 31a

Table of Authorities

Cases

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 20

Boy Scouts of America v. Dale, 530 U.S. 640 (2001) 14

Buckley v. Valeo, 424 U.S. 1 (1976) 13, 19, 21

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 15

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) 26

Consolidated Edison v. Public Service Commission, 447 U.S. 530 (1980) 15

Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127 (1961) 15

Elrod v. Burns, 427 U.S. 347 (1976) 28

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 1, 19, 24, 6a, 7a

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 13, 15, 20, 24

Graham v. Teledyne-Continental Motors, 805 F.2d 1386 (9th Cir. 1986) 12

McConnell v. FEC, 251 F. Supp. 2d 176 (2003) 22

McConnell v. FEC, 540 U.S. 93 (2003) . 1, 2, 12, 14, 16, 19-22, 26, 30

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 20

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) 14

Roberts v. United States Jaycees, 468 U.S. 609 (1984) . . . 14

Roth v. United States, 354 U.S. 476 (1957) 13

Wisconsin Right to Life v. FEC, 126 S. Ct. 1016 (2006) . . 1, 2, 24, 26-28, 30

Constitution, Statutes, Regulations & Rules

11 C.F.R. § 100.29 . . . . . 3, 5

11 C.F.R. § 100.29(c) 18

11 C.F.R. § 109.20(a) 9

11 C.F.R. § 114.2 5

11 C.F.R. § 114.2(a)-(b) 3

11 C.F.R. § 114.2(b)(2) 6

11 C.F.R. § 114.10 6

11 C.F.R. § 114.14 . . . . . 3, 5

11 C.F.R. § 4911(d)(1) 17

2 U.S.C. § 434(f) 14

2 U.S.C. § 434(f)(1)-(3) 3

2 U.S.C. § 434(f)(3)(A)(i) 5

2 U.S.C. § 434(f)(3)(A)(i)(1) 20

2 U.S.C. § 441b 1

2 U.S.C. § 441b(a)-(b)(2) 3, 5

2 U.S.C. § 441b(c)(2) 6

2 U.S.C. § 441b(c)(6)(A) 6

2 U.S.C. § 431(8)(A)(i) 19

2 U.S.C. § 431(9)(A)(i) 19

26 U.S.C. § 501(c)(3) 17

26 U.S.C. § 501(c)(4) 5, 6, 17

26 U.S.C. § 527(e)(2) 18

26 U.S.C. § 56.4911-2(b)(2)(i)-(ii) 17

28 U.S.C. § 1253 3

BCRA § 403 ..... 3, 11

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. X 13

U.S. Const. amend. XIV 13

U.S. Const. amend. XVII 13

U.S. Const. art. I, § 1 13

U.S. Const. art. IV, § 4 13

U.S. Const. preamble 13

Other Authorities

67 Fed. Reg. 65190 6

71 Fed. Reg. 13557 18

150 Cong. Rec. S8459-60 7

Marriage Protection Amendment, S.J. Res. 1 7

Introduction

May the government use campaign finance laws to severely restrict the ability of citizens to lobby their Congressional representatives about upcoming votes in Congress? The right of the people to petition their government is separately protected by the First Amendment to the United States Constitution because it is essential to self-government, and the governmental interests that support regulation of campaign finance do not justify also restricting grassroots lobbying. Grassroots lobbying broadcast ads are genuine issue ads against which the "electioneering communication" prohibition may not be constitutionally applied.

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court facially upheld § 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441b, entitled "prohibition of corporate and labor union disbursements for electioneering communications" ("the prohibition"). This provision prohibits[1] citizens groups such as The Christian Civic League of Maine, Inc. ("League" or "CCL") from mentioning the name of a federal candidate, including incumbent office holders, in any broadcast ad within 30 days of a primary and 60 days of a general election which is targeted to people in his or her particular election district. 2 U.S.C. § 434(f)(3)(A)(i). In *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) ("*WRTL*"), this Court held that the prohibition may be subject to an as applied challenge and remanded the case to the district court to consider an as applied challenge for grassroots

---

[1] "Prohibit" herein means that the corporation or labor union "is *not* free to use its general funds for campaign advocacy purposes," including for electioneering communications, but may use PAC funds for this purpose. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 (1986) ("*MCFL*") (emphasis in original). *See also McConnell*, 540 U.S. at 203 (describing the purpose of 2 U.S.C. § 441b as "to *prohibit* contributions or expenditures by corporations and labor organizations in connection with federal elections" (emphasis added)).

lobbying "in the first instance."[2] *Id.* at 1018.

The present case also presents an as applied challenge to the prohibition for grassroots lobbying. The League has been running a broadcast ad urging citizens in Maine to contact their Senators and urge them to support a constitutional amendment proteeting traditional marriage scheduled for a Senate vote on or about June 5, 2006. The ad mentions the names of both Senators, and one of them, Sen. Snowe, is running unopposed in a June 13, 2006 primary. As a result, this ad is an electioneering communication which the League is prohibited from running during the 30 day blackout period beginning May 14.

Implicit in *WRTL* was this Court's decision that as-applied challenges could not be rejected merely (1) because there are alternative potential means of communication (such as not using broadcast media, not clearly identifying a candidate in an ad, or communicating at other times) or (2) because the ad could have some effect on an election. These were argued as reasons why as-applied challenges could not be permitted under *McConnell* and were necessarily rejected by the *WRTL* decision. Instead, this Court remanded the case to the district court to apply a proper strict scrutiny analysis of grassroots lobbying communications on their merits.

But that is not what the district court did in the present case, relying instead on the two rejected arguments, i.e., alternatives and effect, even though Sen. Snowe is running unopposed and the cited effects are remote and speculative. App. 8a-10a. The district court also speculated that legislators might schedule legislative activity during blackout periods in order to create issues suitable for grassroots lobbying. App. 10a-11a. But this is also speculative and, in any event, would deprive citizens of

---

[2]Instead of expeditiously deciding the remanded case on existing cross-motions for summary judgment, the district court in *WRTL* set a schedule for 'iscovery and new summary judgment briefing, with oral argument not scheduled until mid-September 2006.

their right to petition the government about such matters. As a result, the district court neglected to engage in the narrow tailoring analysis that strict scrutiny requires.

Thus, this case is about the right to petition, raised at a time of busy legislative activity in the midst of an election year, so that the rights of numerous advocacy groups and labor unions are involved. The case implicates interests far broader than just that of the League. It is about the very nature of our system of government and the role of citizens in it.

The League asks this Court to note probable jurisdiction, expedite and advance this case on the calendar, consolidate the present jurisdictional statement briefing with briefing on the merits, and go to the merits, holding that the prohibition is unconstitutional as applied to the League's advertisement and to the sort of genuine grassroots lobbying that it represents.

Opinions Below

The unreported district court opinion and order denying preliminary injunction are reprinted in the Appendix. App. 1a, 14a.

Jurisdiction

The preliminary injunction motion was denied May 9, 2006. The League noticed appeal May 11, 2006. This Court has appellate jurisdiction over the interlocutory order of the three-judge court appointed under BCRA § 403. 28 U.S.C. § 1253.

Constitutional & Statutory Provisions

The First Amendment to the Constitution is at 15a.
2 U.S.C. § 434(f)(1)-(3) (definition) is at 15a.
2 U.S.C. § 441b(a)-(b)(2) (prohibition) is at 18a.
BCRA § 403 (jurisdictional statute) is at 20a.
11 C.F.R. § 100.29 (definition) is at 21a.
11 C.F.R. § 114.2(a)-(b) (prohibition) is at 27a.
11 C.F.R. § 114.14 (prohibition) is at 28a.

Statement of the Case

On April 3, 2006, the League filed its Complaint seeking declaratory and injunctive relief allowing it to fund grassroots lobbying broadcast ads, including its current ad[3] asking the people of Maine to call their Senators and to urge them to support a constitutional amendment protecting marriage.[4] The vote on this constitutional amendment is scheduled for June 5th. The ad is an "electioneering communication" because it mentions the name of a federal candidate, Senator Snowe, who is unopposed in the upcoming June 13th primary, and the League is prohibited from paying for it with corporate funds for thirty days before that primary. The League sought a preliminary injunction to permit it to continue running its ad and a three-judge court, convened pursuant to BCRA § 403(a)(1), denied the preliminary injunction on May 9th. App. 1a, 14a. The League noticed appeal to this Court on May 11. App. 31a.

An "'electioneering communication' means any broadcast,

---

[3]The text of the "Crossroads" ad, App. 1a-2a, is as follows:

Our country stands at the crossroads - at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges - by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard. Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

[4]The League does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grassroots lobbying advertisements. Compl. ¶ 34.

cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office [and] is made within . . . 60 days before a general . . . election for the office sought by the candidate; or . . . 30 days before a primary . . . election . . . for the office sought by the candidate; and . . . is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29. The prohibition provides that "[i]t is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any [Federal] election. . . . For purposes of this section . . . , the term 'contribution or expenditure' includes . . . any applicable electioneering communication . . . ." 2 U.S.C. § 441b(a)-(b); *see also* 11 C.F.R. §§ 114.2 and 114.14.

The League is a Maine nonprofit, nonstock, ideological corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. Compl. ¶ 20. It was formed in 1897 and has been active since that date. Heath Dep. 14:12-14. The League's By-Laws set forth its purposes as follows:

> The purpose of the Christian Civic League of Maine shall be to present and maintain an effective, positive and faithful witness in the public life of our state; to have an impact on the development of public policy in Maine; to uphold a biblical standard of justice and righteousness; and to reflect a genuine Christina [sic] compassion and respect for all people. The League shall endeavor to (1) promote good citizenship; (2) elect honest and competent officials; (3) secure good laws and their impartial execution; and (4) cooperate and assist the home, church and schools in these efforts.

Heath Dep. Ex. ¶ 2. Within the past two years the League has not done anything other than produce voter guides to pursue its goal of electing honest and competent officials. Heath Dep. 16:18-17:8. Although the League intends to continue producing

voters guides, it has not and does not intend to endorse or oppose candidates for office, even through its associated state political action committee, the Christian Action League. Heath Dep. 17:2-4, 23:16-24:9; 25:2-12; 93:12-17.

The League does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition, with which the district court agreed, App. 6a-7a, and (b) its ad is "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A). Compl. ¶ 22.

Defendant Federal Election Commission ("FEC") is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act ("FECA"), as amended by the BCRA. The FEC considered creating a regulatory exception to the challenged prohibition for grassroots lobbying, but decided it was beyond the exception-making authority granted it by Congress. 67 Fed. Reg. 65190, 65200-02.

The League has been associated with Focus on the Family ("Focus") for approximately 15 years. Heath Declaration ¶ 3, April 21, 2006. Focus often corresponds with the League regarding policy issues of mutual interest, including the federal Marriage Protection Amendment. Heath Decl. ¶ 7. The defense of traditional marriage as the union of one man and one woman is a high priority for both organizations, which believe that traditional marriage is the foundation of society and the best environment in which to raise children. Heath Decl. ¶ 4. Court cases like those in Vermont and Massachusetts that forced civil unions and homosexual marriage on their citizens without benefit of the democratic process have highlighted for the

League the need for a federal Marriage Protection Amendment. Heath Decl. ¶ 5. Sometime in, or prior to, 2004 the League first became aware that Congress was considering a federal constitutional amendment protecting marriage. Heath Dep. 33:16-25. The League engaged in grassroots lobbying for the federal Marriage Protection Amendment in 2004 through phone calls, e-mail, the internet, printed and internet versions of its newsletter, "The Record," bulletin inserts, Heath Decl. ¶ 8; Heath Dep. 34:8-11, 35:1-8, and a radio ad encouraging people to contact Senators Snowe and Collins and ask them to support traditional marriage. Heath Decl. ¶ 8. That ad stated:

> The Christian Civic League of Maine is organizing a campaign to let Senators Snowe and Collins know that we support the Federal Marriage Amendment. If you want homosexual marriages banned in our country, we need you to contact your Senators and ask them to support traditional marriage. For more information on this amendment please see our website at www.cclmaine.org or call us at our Augusta office at 622-7634. Thank you for preserving the purity of life and protecting the future of this nation.

Pl.'s Resp. to Def.'s Req. for Prod. # 2, 3 and 4, "Radio Announcement, July '04."

In January 2005, the Marriage Protection Amendment S.J. Res. 1 was introduced. On November 9, 2005, the Subcommittee on Constitution, Civil Rights and Property Rights of the Committee on the Judiciary favorably approved the Marriage Protection Amendment for full committee consideration without amendment. 150 Cong. Rec. S8459-60. A vote for cloture in the Senate on S.J. Res. 1 is likely to occur in early June 2006. Compl. ¶ 9; *see also* Def.'s Ex. J in Supp. of Its Opp'n to Pl.'s Mot. for Prelim. Inj., *Republican Chief Outlines Strategy to Portray Democrats as Weak, Bypass Mainstream Media*, Feb. 11, 2006 (Frist "said he would push for a vote on June 5 on 'the marriage protection amendment.'". Previous

versions of a federal constitutional amendment to protect traditional marriage have not garnered sufficient support in Congress. Compl. ¶ 10. Therefore, the progress of S.J. Res. 1 in the Senate this summer is critical. Compl. ¶ 10. Tim Russell, the League's lobbyist, has participated in multiple conference calls, e-mail exchanges and discussions with legislators, grassroots activists, media, and national level pro-family groups regarding the federal Marriage Protection Amendment. Heath Decl. ¶ 9.

The decision regarding when to run ads like the "Crossroads" ad is necessarily tied to legislative decisions about debate and votes on the federal Marriage Protection Amendment. Heath Decl. ¶ 12; *see also* Heath Dep. 47:1-9. Because the timing of grassroots lobbying campaigns is inherently dependent on legislative whims, it is difficult to plan specific campaigns in advance and they are often created and executed within very short time frames. Heath Decl. ¶ 12. Such is the case with the "Crossroads" ad, which was developed because the Senate had finally decided to hold a vote on the federal Marriage Protection Amendment in early June. Heath Decl. ¶ 12. The League has confirmed its plan to run the "Crossroads" ad 22 times per week at a cost of $998 per week. Heath Decl. ¶ 15; Heath Decl. Ex. A. One long-time donor has committed to paying the entire $3,992 cost of the radio buy so that the ads may be run for four weeks as scheduled. Heath Decl. ¶ 16.

The League has been critical of Sen. Snowe's positions on marriage and partial-birth abortion, Heath Dep. 83:14-21, and would rather have a candidate whose views are closer to its own. Heath Dep. 85: 14-18. However, "CCL has not 'opposed' Senator Olympia Snowe or 'endorsed' an opponent of hers in an election for federal office." Pl.'s Resp. to Def.'s Interrog. # 12; Heath Dep. Ex. 10 ¶ 12. Moreover, the "Crossroads" ad should not have any effect on Sen. Snowe's primary election because she is running unopposed. Heath Dep. 74:6-9.

The "Crossroads" ad expresses an opinion on pending Senate legislative activity, which is imminently up for a vote, and urges listeners to contact their Senators and to urge them to vote a certain way in that vote, so that this ad constitutes bona fide grassroots lobbying. The ad deals with concrete, imminent, legislative issues, beyond the timing and control of the League, with which the two incumbent Senators must deal. The ad refers to both a candidate and a non-candidate and deals with them equally. The ad deals exclusively with the legislative issue, with which the League has a clear and long-held interest, not on any candidate, and does not refer to any political party or election. The ad does not expressly advocate the election or defeat of a clearly identified candidate for federal office. The ad only comments on the League's opinion on prior votes on the marriage issue and does not comment on a candidate's character, qualifications, or fitness for office. The ad is broadcast independent of any candidate or political party in that it is not "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. § 109.20(a).

Broadcast advertisements are the most effective form of communication for the present grassroots lobbying campaign, and non-broadcast communications would not provide the League with sufficient ability to reach the people of Maine with the League's message. Compl. ¶ 46; Pl.'s Resp. to Def.'s Interrog. # 2, 3; Heath Dep. Ex. 10 ¶ 2, 3. While a non-broadcast communication is effective with regard to those who receive it, such communication is necessarily limited by the number of subscribers the League has to those communications, and broadcast ads, particularly radio ads, are more effective because they consistently reach more persons per dollar spent. Heath Decl. ¶ 17; Pl.'s Resp. to Def.'s Interrog. # 2, 3; Heath Dep. Ex. 10 ¶ 2, 3. Moreover, the League has found that renting

phone lists and hiring a phone bank for a telephone campaign is costly and not as effective as broadcast ads. Heath Decl. ¶ 18. Furthermore, people are more receptive to broadcast ads than the intrusive ring of unsolicited telephone calls which seem to come at inopportune moments. Heath Decl. ¶ 18.

Further, creating a federal political action committee would be more burdensome for the League than its affiliated State PACs because there are no limits on contributions to those entities because they were formed to support/oppose referenda. Heath Decl. ¶ 20. In contrast, federal PACs are subject to contribution limits, because they are presumed to be formed for the purpose of supporting or opposing candidates. Heath Decl. ¶ 20. Federal corporate PACs are also limited to fundraising from the corporation's members, which necessarily limits the pool of available contributors to the League's approximately 300 members[5] and would not encompass its nearly 2,500 supporters. Heath Decl. ¶ 20; Heath Dep. 41:9-42:14. The limited pool of donors would make it much more difficult to raise the funds needed to engage in a broadcast advertising campaign such as the "Crossroads" campaign it plans to undertake in support of the federal Marriage Protection Amendment. Heath Decl. ¶ 20.

In addition, some of the League's members have theological objections to contributing to political action committees, Heath Decl. ¶ 21; Heath Dep. 103:24-104:4, and some Christians are reluctant to link the church and the state too closely. Heath Decl. ¶ 21. Because some of the League's members subscribe to this belief, it would increase its difficulties in raising money

---

[5]Membership in the League is limited to those who "sign[] a statement that they agree with the [the League]'s mission, Statement, Purpose and Statement of Faith . . . and who pay[] the annual membership fee." (Heath Dep. Ex. 1 ¶ 4a, By-Laws) Further, "[a]ll board members, officers, committee members and employees of [the League] must be members of [the League]." *Id.*

for a federal political action committee. Heath Decl. ¶ 21.

Finally, altering the League's ads so as to not mention the names of Maine's two Senators would not be as effective, because the point of the grassroots lobbying effort is to ask the citizens of Maine to call their Senators and tell them how they would like them to vote on the federal Marriage Protection Amendment. Heath Decl. ¶ 22. Giving the names of the Senators helps the potential callers to be more comfortable making the requested call because they can simply ask for him or her by name rather than dealing with the awkwardness of saying "I'm from Maine, I don't know the name of my Senator but can you connect me to him." Heath Decl. ¶ 22. Regardless, the League's executive director understands that simply saying "call your Senator" would still violate the electioneering communication prohibition, because the FEC's rule specifically says that an electioneering communication refers to a clearly identified candidate when it uses an "unambiguous reference" to the identity of the candidate and lists "your Congressman" as an example. Heath Decl. ¶ 22.

The Questions Presented Are Substantial

The questions presented are substantially greater than even the harm to the League, which in itself involves irreparable loss of First Amendment expression, association, and petition rights. Grassroots lobbying is a time-honored way that citizens involve themselves in the American system of participatory, representative democracy – it is the essence of self-government. At this busy election season, the rights of numerous similar groups who want to lobby their members of Congress are at stake.

Congress by statute has recognized that constitutional challenges to BCRA are so substantial that they require a special jurisdictional statute that directs all challenges to one court, with a three-judge panel, and provides direct, expedited appeal to this Court. BCRA § 403. There is no possibility of cases from other circuits percolating up to provide circuit splits

until sometime well after January 1, 2007, when challenges to BCRA may begin to be brought in other federal courts. *Id.*

I. The League Has Likely Success on the Merits.

What is the proper standard of review? While the appeal is from the denial of a preliminary injunction, that standard of review should not be employed for two reasons. First, because the League will lose forever its opportunity to speak before the anticipated June 5 Senate vote if relief is not granted, the decision on preliminary injunction resolves the whole matter so that it should be considered a final judgment.[6] Second, because of the press of time, this Court should go to the merits, so that it should not be limited to the standard for reviewing the denial of preliminary injunctions. But under either standard, the League should prevail and the League provides briefing on the preliminary injunction elements.

The League has a substantial likelihood of success on the merits of this as-applied challenge. In *McConnell*, 540 U.S. 93, this Court upheld the electioneering communication prohibition against a facial challenge. In *Wisconsin Right to Life*, 126 S. Ct. 1016, this Court explained that as-applied challenges to the electioneering communication prohibition were not resolved or precluded by its holding in *McConnell*. *Id.* at 1018. This is an as-applied challenge and the Constitution requires an exception to the electioneering communication prohibition. Any constitutionally sound exception will include the broadcast ad here and grassroots lobbying generally.

---

[6] *Cf. Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir. 1986) (because denial of temporary restraining order "effectively decided the merits of the case" and there were "no facts in dispute," appellate court decided case "as an appeal from a final judgment denying permanent injunctive relief").

A. An Exception for Genuine Grassroots Lobbying Is Constitutionally Required.

Should incumbent politicians be able to insulate themselves from lobbying about upcoming votes in Congress through campaign finance regulations? The League believes not and seeks relief as to (1) its broadcast ad specifically *and/or* (2) grassroots lobbying generally.

1. The Constitution Protects Grassroots Lobbying.

The people are sovereign. U.S. Const. preamble; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to require that Senators be "elected by the people." U.S. Const. amend. XVII. The people mandated Congress not to restrict their rights to speak, associate,[7] and petition in the exercise of the people's sovereign right to participate in representative self-government. U.S. Const. amend. I.

The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."

---

[7] "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

Id. at 777.

While the individuals who make up the League could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying through broadcast ads is prohibited for up to 90 days during an election year. Citizen groups formed under the right of association are an essential component of democracy in action. In *Buckley*, the Supreme Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[8] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by permitting amplified individual speech. *Id.* at 22.

Grassroots lobbying is also protected by rights not considered in *McConnell*, i.e., the inherent right of the people to participate in self-government and the express First Amendment right to petition, along with a line of cases protecting corpora-

---

[8]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

tions' right to contact both legislators and the public about pending legislative and executive matters.

The right of corporations to petition both the legislative and executive branches was recognized in *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 135 (1961). The Supreme Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not constitute a violation of the Sherman Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government").

In *Bellotti*, 435 U.S. 765, the Supreme Court applied the right of petition to corporations that sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, and held that this was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies" and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31; *see also Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980).

The overarching principle of these cases is the right of the people to lobby incumbent politicians about their conduct in

office. Where the express right of petition and the inherent necessity of the people's participation in self-government are added to the rights of free expression and association, the electioneering communication prohibition must yield to the weight of constitutional necessity and allow an exception for grassroots lobbying.

Grassroots lobbying is the work of a vibrant republic, with active involvement of the people in their own self-government. And self-government does not end 30 days before a primary or 60 days before a general election.[9] If the most effective means to do grassroots lobbying – broadcast media – can be banned during that time, then the people are deprived of their right to participate in their own self-government.

---

[9]In *McConnell*, the ACLU provided a summary Chart of "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." Joint Appendix at 622-26, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*) and made the following observations about pre-election legislative activity:

> [E]lection years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. . . . During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* [Chart]. Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election.

Brief of Appellant at 12-13, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*). A longstanding practice in Congress is to attach riders to appropriation bills, which are considered in the fall prohibition periods. Movement of controversial legislation to prohibition periods may reasonably be expected because less opposition can be generated at such times.

2. Grassroots Lobbying Is Not Electioneering.

a. There Is a Distinction Between Grassroots Lobbying and Electioneering.

The Internal Revenue Code makes a distinction between grassroots lobbying and electioneering. The Internal Revenue Code provides that:

> [A] "Grass roots lobbying communication" is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements:" (1) "refers to specific legislation," (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation."

26 U.S.C. § 56.4911-2(b)(2)(i)-(ii). Advocacy groups such as the League that are exempt under 26 U.S.C. § 501(c)(4), may spend an unlimited amount of their general treasury funds on lobbying, either "grass roots lobbying" or legislative lobbying.[10] Charities exempt under 26 U.S.C. § 501(c)(3), however, may spend only an insubstantial amount on lobbying of any kind.

Under the IRC, electioneering is referred to as "political intervention" and is more severely restricted. Nonprofit corporations under § 501(c)(3) may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office," *id.*, while advocacy groups under § 501(c)(4) may do so, but may spend only an insubstan-

---

[10] "Grass roots lobbying" includes "(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof," while "legislative lobbying" refers to "(B) any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of the legislation." 11 C.F.R. § 4911(d)(1).

tial amount on political intervention. Political intervention is dealt with under the term of "exempt function," in 26 U.S.C. § 527(e)(2), and:

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

So the IRC distinguishes between lobbying, which is seeking to influence legislation, and political intervention, which is seeking to influence elections.[11]

---

[11]A diverse group of interested parties has recently offered another useful proposal for defining a grassroots lobbying exception to the electioneering communications prohibition. The FEC has published Notice 2006-4, entitled "Rulemaking Petition: Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication." 71 Fed. Reg. 13557. The petition asked for an expedited rulemaking

> to revise 11 C.F.R. 100.29(c) to exempt from the definition of "electioneering communication" certain "grassroots lobbying" communications that reflect all of the following principles: 1. The "clearly identified federal candidate" is an incumbent public officeholder; 2. The communication exclusively discusses a particular current legislative or executive branch matter; 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter; 5. The communication does not refer to an election, the candidate's candidacy, or a political party; and 6. The communication does not refer to the candidate's character, qualifications or fitness for office.

While the League does not believe that this rule goes as far as the Constitution extends protection to grassroots lobbying, it provides a useful definition

While the term "influencing" has not been construed in the IRC context, FECA contains a similar definition of electioneering by defining political "contributions" and "expenditures" as ones made "for the purpose of influencing any election for Federal office." 2 U.S.C.§§ 431(8)(A)(i) and 431(9)(A)(i). Because of the vagueness and potential overbreadth of this phrase, the Supreme Court has construed "influence" to require express advocacy of the election or defeat of a clearly identified candidate. *Buckley*, 424 U.S. at 79-80 (construing "purpose of influencing," in §§ 431(8) and (9), to require express advocacy), and *McConnell*, 540 U.S. at 190-92. *See also Buckley*, 424 U.S. at 42-44 (construing "relative to" to require express advocacy) and *MCFL*, 479 U.S. at 248-49 (construing "in connection with an election," in the prohibition at § 441b, to require express advocacy). As a result of these constructions, FECA clearly applied only to electioneering and not grassroots lobbying prior to enactment of BCRA.

Central to these "express advocacy" holdings, and to the speech protections of the First Amendment generally, was the idea that the *speaker* must be able to know, based on the meaning of the words he is speaking, which side of the line the speaker is on. Requiring "explicit words" of advocacy of the election or defeat of a candidate does this. *Buckley*, 424 U.S. at 43. Thus, the speaker is not left to "hedge and trim," wondering how the hearer might interpret the message based on factors external to the communication itself. *Id. McConnell* endorsed the express advocacy construction of the language at issue in *Buckley* and *MCFL* to avoid vagueness and overbreadth. 540 U.S. at 192.

BCRA added the electioneering communication provision, which applies to certain communications that "refer[] to a clearly identified candidate for Federal office," without any

---

that balances the concerns of all sides and provides a workable test.

further content requirements. 2 U.S.C. § 434(f)(3)(A)(i)(1). *McConnell* upheld this provision on its face because it was not vague or overbroad. 540 U.S. at 194. It was not vague because "clearly identifying a candidate" is not vague. *Id.* (quoting definition). And it was not overbroad because electioneering communications generally were found to be the "functional equivalent of express advocacy." *Id.* at 206. However, since effective grassroots lobbying requires reference to an incumbent, who may be a candidate, this provision, on its face, encompasses grassroots lobbying, and this case presents the need to distinguish, for purposes of campaign finance laws, between grassroots lobbying and electioneering.

The distinction between grassroots lobbying and electioneering has been discussed in campaign finance cases, but has not yet been definitively decided. Justice Stevens raised the distinction in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), where he said that "there is a vast difference between *lobbying* and debating public issues on the one hand, and political campaigns for election to public office on the other." *Id.* at 678 (Stevens, J., concurring) (emphasis added). Justice Stevens' view seems to have been carried over to his opinion for the Court in *McConnell* where, in footnote 88, the Court reiterated that, while government may regulate electioneering, it may not regulate "genuine issue ads" and distinguished *McConnell* from *Bellotti*, 435 U.S. 765, and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). *McConnell*, 540 U.S. at 206 n.88. Justice Kennedy, moreover, argued in *McConnell* that corporations ought to be able to do both electioneering and lobbying. 540 U.S. at 764 (Kennedy, J., dissenting).

b. Genuine Grassroots Lobbying Is No Sham.

McConnell said that the "constitutionally adequate justification" for upholding the electioneering communication prohibition was that the "sham issue ads" considered there were the

"functional equivalent of express advocacy." 540 U.S. at 206. So the issue here is whether grassroots lobbying ads equate to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. Or is grassroots lobbying a "genuine issue ad" which may not be prohibited?

Grassroots lobbying ads are not "sham issue ads" and have nothing to do with elections. They are about legislative action and effective participation by the people in self-government. Lobbying seeks to influence the exercise of government power by incumbent officeholders today, while electioneering seeks to influence who will exercise governmental power in the future. The people's right to influence their representatives on pending legislative matters today is more pressing and potentially more important than who might be their representative next year.

Further, if this Court were to accept the proposition that the people may be silenced now on upcoming votes in Congress because it might affect future elections, where would it end? Based on such a proposition, grassroots lobbying could be banned at all times because it might always have a remote effect on elections. There would be no constitutional way to limit such a ban to 30 plus 60 days in a year.

Throughout the *McConnell* litigation, grassroots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grassroots lobbying must be excluded from the "sham issue ad" category. He found that grassroots lobbying did not support or oppose candidates, declaring that his approach to the electioneering communication definition

> assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, *genuine*

> *issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. See* Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate).

McConnell v. FEC, 251 F. Supp. 2d 176, 803 (2003) (Opinion of Judge Leon) (emphasis added except as to "*unrelated*"). Up to 17% of the ads for which the *McConnell* district court did fact finding were "genuine issue ads" (in which Judge Leon included grassroots lobbying), with possibly more genuine ads in years with more hot-button legislative issues. *Id.* at 798-99.

c. Grassroots Lobbying Does Not Implicate *McConnell*'s Concerns.

Grassroots lobbying does not implicate *McConnell*'s expressed concerns about "sham issue advocacy." 540 U.S. at 132. *McConnell* clearly identified what the Court meant by that term, beginning with a section entitled "Issue Advertising." *Id.* at 126.

First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

Second, the Court noted that "sham issue ads" closely resembled express advocacy ads. Both such ads and express advocacy ads "were used to advocate the election or defeat of clearly identified federal candidates," *id.* at 126, and *McConnell* provided an immediate example of what the Court meant by

that: "Little difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27. In its discussion of BCRA Title II, the Court returned to this aspect of "sham issue ads" with this example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> > "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

540 U.S. at 193 n.78. This Court approved BCRA's solution of requiring disclosure and eliminating the use of corporate or labor union money for such ads, except as applied to *MCFL*-type corporations, which could not be prohibited from using corporate money for "electioneering communications" because such corporations do not pose the corruption risks represented by business corporations. *Id.* at 209-11 (creating the first as-applied exception to the prohibition).

Grassroots lobbying ads implicate none of these concerns. Because the League does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of

all electioneering communications, both as to disclaimers and public reports. The whole system would be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31 ("The First Amendment rejects the 'highly 'paternalistic' approach . . . .").

And there will be no ads resembling express advocacy or the "sham ads" that the Court found to be "functional equivalents." *Id.* at 206. As may be seen in the sample offered by the League, grassroots lobbying ads focus on passing or defeating pending legislation, not electioneering, and are of no (or only de minimis) value for the purposes of opposing or supporting candidates. But they are essential to self-government.

Further, the desirability of a "bright-line rule" does not defeat this as-applied challenge. The Supreme Court has already decided that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in original).[12] This Court in *WRTL* also necessarily rejected a bright-line rule approach, when it approved as-applied challenges to the prohibition. 126 S. Ct. 1016.

---

[12]In any event, this Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL*. *Id.* at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

3. The League's Ad Is Not Electioneering.

Furthermore, the League's grassroots lobbying ad is not express advocacy or its functional equivalent. In making this determination, the text of the ad itself must be examined, not external factors. *Buckley*, 423 U.S. at 43 (express advocacy is "limited to *communications* that include *explicit words* of advocacy . . ." (emphasis added)). The ad does not, of course, contain explicit words expressly advocating the election or defeat of a clearly identified candidate, nor is it the functional equivalent.

The sole focus of the ad is imminently pending, specific legislative activity while Congress is in session, the timing of which was beyond the control of the League. The ad asks for calls to *incumbent* Senators who clearly have power to immediately affect the Amendment. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past.

The main reference to Sen. Snowe is in the closing call to her constituents to contact her and ask her to support the Amendment. As Judge Leon noted, even the *McConnell* defendants' own expert concluded that an ad mentioning a candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

The League's ad asks constituents to call *both* Sen. Collins and Sen. Snowe, lessening the focus on Sen. Snowe even more and indicating that the issue was the Amendment, not Sen. Snowe. The ad mentions no election, candidacy, or political party, and says nothing about the Senators' character, actions, or fitness for office. The ad does say that the Senators had both opposed the Amendment in an earlier permutation, but this is a reference to their position on an issue, not their suitability for office.

The ad deals with non-candidate Collins and candidate Snowe equally, not singling Sen. Snowe out in any way. The ad deals with a long-time, natural concern for the League, which would like a federal marriage-protecting amendment passed, so there is no question of a made-up issue. The League will run the same ad outside the blackout periods during which time there is no congressional or court finding that there is any equivalence with express advocacy. And the ad deals with an unprecedented issue of vital national importance that is just now coming to a head at a scheduled vote for cloture in early June, which facts were a matter of public record and beyond the League's control.

In sum, the League's ad is not of the "functional equivalent of express advocacy." Prohibiting the League from running it with its general treasury funds would therefore be unconstitutional.

B. The District Court's Analysis Is Flawed.

The district court's analysis was flawed in several ways. It relied on the presence of alternatives, such as using a PAC[13] or not broadcasting the Advertisement, or doing it some other time. App. 9a. But this ignores the plain implication of *Wisconsin Right to Life*, 126 S. Ct. 1016, which rejected the argument that as-applied challenges could not be brought because *McConnell* said such alternatives were sufficient. The existence of such alternatives is presumed in all as-applied challenges in the wake if *WRTL*, but they do not establish narrow tailoring.

Similarly, the district court relied on the fact that there might be some effect on the election. App. 10a. But *WRTL* implicitly rejected such arguments as sufficient to bar grassroots

---

[13]Requiring grassroots lobbying to be done in a PAC would subject that activity to contribution limits, but contribution limits are unconstitutional in the context of grassroots lobbying because there is no potential for corruption. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

lobbying. Almost anything may affect elections, but that does not mean the Congress may regulate everything for that reason. And the effects the district court recited are too remote, speculative, and lacking in any real nexus to a compelling interest to satisfy strict scrutiny.

The district court speculated, with no record evidence, that Congress might schedule legislative activity near elections in order to permit grassroots lobbying that might be helpful to candidates. App. 101-11a. But if Congress cannot be trusted in that respect, neither can it be trusted not to schedule important matters within prohibition periods, necessitating an exception to the prohibition for grassroots lobbying. More importantly, can the people's rights be made to depend on what politicians might do?

One unique detail of the League's ad reaches further than those at issue in *WRTL*, but does not reach the outer limits of what the Constitution requires. The League believes that there is no constitutional justification for prohibiting a citizen group from stating a legislator's position (for, against, or undecided) on a pending legislative matter in a grassroots lobbying communication. However, the district court decided that the Advertisement was really a "sham" because of the use of the word "unfortunately," when stating that the Senators voted against the constitutional amendment previously. App. 10a. The district court called this a "veiled attack." *Id.* But a "veiled" attack necessarily cannot be the functional equivalent of express advocacy, which required express words of advocacy. "Unfortunately" does not even rise to the level of supporting, opposing, attacking, or promoting. It is a mild statement about the differing positions of the League and the Senators on the constitutional amendment, which is appropriate for grassroots lobbying.

The district court never even discussed the right to petition, which was a central part of the Leagues's argument. And simply

reviewing its opinion shows that it did not actually engage in narrow tailoring analysis, although it purported to do so by using the words. App. 8a-9a. The district court failed to come to grips with the real issues of this case and was wrong in its conclusion.

II. The League Will Suffer Irreparable Injury.

The League is currently barred by BCRA from engaging in grassroots lobbying communications that refer to Senator Snowe from May 14, until June 13 2006, which is precisely the time when the League needs to run an ad encouraging support of the Marriage Protection Amendment. Without injunctive relief, the League's ability to make these communications will be irreparably lost. Loss of First Amendment rights is automatically irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, this required element for preliminary injunctive relief is met.

The district court said there was no irreparable harm because of the alternatives available to the League and because it had failed to establish likelihood of success on the merits. The Court was wrong because the implication of *WRTL* is that reciting alternatives is an insufficient analysis, as already discussed, and because it was wrong on its analysis as to the likelihood of success.

III. An Injunction Harms No Other Parties.

The League would be freely able to run its ad, and may continue to freely do so up until May 14, without any constitutionally cognizable harm to anyone. On May 14, the League may continue to run its ad calling on Sen. Collins to support the Amendment without any cognizable harm to anyone. And no harm will arise at the stroke of midnight on May 13 to Sen. Snowe because the League's ads are about Sen. Snowe's job as

a Senator, accountable to the people of Maine year-round, and not about her position as a candidate. It is so because rallying constituents on an urgent, important legislative issue is not a harm to a legislator – it is part of her job to be petitioned by the people. It is so because it is part of the American system of participatory democracy. It is so because gagging the people right before vital legislative action is not narrowly tailored to any compelling governmental interest. Moreover, it is so because Sen. Snowe is unopposed in the Maine Republican primary: what interest does the government have in curtailing calls to lobby a Senator during a period when she is not even challenged? Therefore, there will be no constitutionally cognizable harm to others if the requested injunctive relief issues.

The district court was unable to point any real harm to Sen. Snowe, although it speculated some unlikely possibilities, so it relied on harm to the FEC and the public in not being able to enforce the law as it exists. App. 12a. But of course, if that were always prevailing there could never be a preliminary injunction against the FEC. That is not the law, however. If the constitution requires an exception for grassroots lobbying, as this Court may readily determine, the FEC has no interest in enforcing the law as so applied.

IV. An Injunction Is in the Public Interest.

It is clearly in the public interest for Americans to be able to associate in citizen groups, such as the League, to more effectively involve themselves in the American system of participatory government by expressing themselves on imminently pending legislative matters and calling on other citizens to petition government officials. It is in the public interest for citizens to know about the issue of the federal Marriage Protection Amendment and the ongoing conflict over it. Therefore, the requested injunctive relief serves the public interest.

The district court found no public interest in protecting the public's right to engage in self -government by exercising the right to petition. App. 13a. It failed to take into account this Court's decision in *McConnell* and *WRTL*, which indicated clearly that there are "genuine issue ads" that have constitutional protection.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction, expedite and advance this case on the calendar, consolidate the present jurisdictional statement briefing with briefing on the merits, and go to the merits, holding that the prohibition is unconstitutional as applied to the League's advertisement and to the sort of genuine grassroots lobbying that it represents.

Respectfully submitted,

M. Miller Baker
Michael S. Nadel
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005
202/756-8000

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Raeanna S. Moore
Jeffrey P. Gallant
Bopp, Coleson & Bostrom
The James Madison Center for Free Speech
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434

APPENDIX

Appendix Table of Contents

Memorandum Opinion 1a
Order 14a
U.S. Constitution, First Amendment 15a
2 U.S.C. § 434(f)(1)-(3) 15a
2 U.S.C. § 441b(a)-(b)(2) 18a
BCRA § 403 ..... 20a
11 C.F.R. 100.29 ..... 21a
11 C.F.R. 114.2(a)-(b) 27a
11 C.F.R. 114.14 ..... 28a
Notice of Appeal to U.S. Supreme Court 31a

[file mark: May 9, 2006]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., Plaintiff,	) Civil Action No. 06-0614 (JWR, LFO, CKK) (Three-Judge Court)
v.	)
FEDERAL ELECTION COMMISSION, Defendant,	)
and	)
JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, Intervenor-Defendants.	)

MEMORANDUM OPINION

Plaintiff, the Christian Civic League of Maine, Inc. (the "League"), is a self-styled "nonprofit, nonstock . . . ideological" corporation that engages in some business activity. Verified Complaint ¶¶ 20, 22. It strongly supports the proposed Marriage Protection Amendment (S.J. Res. 1), now pending in the United States Senate. Anticipating that the Senate will discuss and vote on this Amendment in early June 2006, the League plans to use its general corporate funds to broadcast in Maine, between May 10 and early June 2006, the following radio advertisement:

> Our country stands at the crossroads – at the intersection of how marriage will be defined for future generations.

> Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges – by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

Id., Ex. A. A single, individual donor has committed to a donation to the League to cover the cost of funding the broadcast.

However, the Federal Election Communications Act – as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, and codified at 2 U.S.C. § 431 *et seq.* (the "Act") – prohibits corporations from using general corporate funds for "electioneering communication[s]," 2 U.S.C. § 441b(a), (b)(2), defined as any "broadcast, cable, or satellite" communication, issued within thirty days of a federal primary election or sixty days of a general federal election (the "blackout period"), that "clearly identifie[s]" a candidate in that election and "target[s]" the relevant electorate, 2 U.S.C. § 434(f)(3)(A)(i). Because Senator Snowe is a candidate in a primary election scheduled for June 13, 2006, the League's proposed advertisement falls within the definition of the "electioneering communications" barred by the Act.

Defendant Federal Election Commission is charged by the Act with the responsibility to enforce it. Seeking to bar the Commission from enforcing the Act with regard to its proposed advertisement, the League has filed a complaint against the

Commission along with a motion for a preliminary injunction.[1] The League contends that, although the Act by its terms bars its proposed broadcasts of the advertisement, the First Amendment[2] protects the League's right to run it because it addresses an issue expected to come to a vote in the Senate during the relevant time (i.e., because it constitutes, in the League's terms, "grass roots lobbying"). Senators John McCain and Russell Feingold and Congressmen Christopher Shays, Martin Meehan, and Tom Allen have intervened as additional defendants. On April 24, 2006, we held an expedited hearing on the League's motion for a preliminary injunction. *See* 28 U.S.C. § 2284.

The League concedes that it could publish its proposed advertisement, during the desired time period, without running afoul of the Act (and thus without implicating the First Amendment and/or any occasion for a preliminary injunction) if it:

(1) funded the advertisement through a political action committee rather than via general corporate funds;

(2) published the advertisement in a medium other than "broadcast, cable, or satellite" (e.g., newspapers, leaflets, e-mails, telephone banks); or

---

[1]The League also seeks a preliminary injunction, unlimited time-wise, that would encompass "any electioneering communications by [the League] that constitute grass-roots lobbying." Verified Complaint, Prayer for Relief. The League, however, fails to define "grassroots lobbying" (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction. Accordingly, its request for the broader preliminary injunction is unwarranted. The balance of this memorandum opinion addresses the League's motion only insofar as it seeks an injunction barring the Commission from enforcing the Act against the League's proposed advertisement in the thirty days before Maine's June 13, 2006 primary election.

[2]The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

(3) altered the script of the advertisement to refrain from "clearly identif[ying]" Senator Snowe.

Given this concession, *inter alia*, we conclude that the League has established neither a substantial likelihood of success on the merits nor that it will be irreparably injured in the absence of the "extraordinary remedy" of a preliminary injunction. *See Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004); *accord Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, J., in chambers). We therefore also conclude that the requested preliminary injunction would substantially injure the Commission and not serve the public interest. Accordingly, as more fully explained below, an accompanying Order denies the League's motion for a preliminary injunction.

I. BACKGROUND

In *McConnell v. Federal Election Commission*, 540 U.S. 93, 189-94, 203-11 (2003), the Supreme Court upheld the Act's electioneering communications provision from a facial attack on its constitutionality under the First Amendment. The Court did so in full realization that the electioneering communications provision encompasses some "issue advertis[ements]." *McConnell*, 540 U.S. at 126-32, 189-94, 203-05. Indeed, the Court carefully catalogued the past use of such advertisements to influence elections improperly. *See id.* at 126-32. The Court cited examples, including the infamous "Bob Yellowtail" advertisement. It excoriated candidate Yellowtail for "t[aking] a swing at his wife," being "a convicted felon," and "fail[ing] to make his own child support payments" yet closed as if a mere issue advertisement: "Call Bob Yellowtail. Tell him to support family values." *Id.* at 193 n.78. The Court observed: "Little difference exist[s] . . . between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s] Jane Doe's record on a particular issue before exhorting viewers to 'call

Jane Doe and tell her what you think.'" *Id.* at 126-27. Given these realities, the Court concluded that the Act's electioneering communications provision was tailored sufficiently narrowly to meet a compelling governmental interest and to survive constitutional scrutiny. *See id.* at 193, 204-06. As the Court pointedly noted: "[C]orporations and unions may finance genuine issue ads during th[e blackout] time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206.

Subsequently, a Wisconsin corporation – on facts markedly similar to those before us here – brought an as-applied challenge to the electioneering communications provision, seeking to run an "issue" advertisement in the run-up to a primary election. *See Wis. Right to Life, Inc. v. Fed. Election Comm'n*, slip op., No. 04-1260 (D.D.C. Aug. 17, 2004); slip op., No. 04-1260 (D.D.C. May 9, 2005). Holding that the Supreme Court's decision in *McConnell* necessarily foreclosed as-applied challenges to the electioneering communications provision, a three-judge district court denied that corporation's motion for a preliminary injunction and subsequently dismissed the case. The Supreme Court, however, reversed and remanded, clarifying that its decision in *McConnell* did not pose an absolute bar to as-applied challenges to the electioneering communications provision of the Act because the Constitution might require that a particular advertisement be exempted from the Act's definition of an electioneering communication. *See Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 126 S. Ct. 1016, 1018 (2006). The League argues that this is such a case.

II. ANALYSIS

The League's pending motion for a preliminary injunction presents two issues: (1) whether the League has standing, and (2) if it does, whether it is entitled to a preliminary injunction. As explained below, we conclude that the League has standing

but that a preliminary injunction is not warranted.

A. Standing.

The Commission first argues that the League lacks standing under Article III of the Constitution because it has failed to allege facts to demonstrate that it is injured by the statutory provision it challenges. *See* Commission Opp'n Br. at 14; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Specifically, the Commission argues that the League lacks the funds it would need to run the advertisement, has not taken any steps to plan for its broadcast, and thus cannot demonstrate that it would be injured if it were unable to broadcast the advertisement provided to it by others. *See* Commission Opp'n Br. at 14. However, a declaration of the League's Executive Director, Michael Heath, affirms under penalty of perjury that it now has caused its proposed advertisement to be recorded and has a donor "committed to paying the entire $3,992 cost of the radio buy." Pl.'s Reply in Supp. of Mot. for P.I., Ex. A (Apr. 21, 2006 decl. of Michael Heath) ¶¶ 14-16. Mr. Heath also affirms that the advertisement addresses an issue of high priority for the League. *See id.* ¶¶ 4, 8. This evidence suffices to establish, for purposes of this preliminary injunction application, that – absent the requested injunction – the League would suffer injury in fact, since it is now ready, willing, and able to broadcast the proposed advertisement.

The Commission also argues that the League lacks standing because it *may* qualify as an "*MCFL* organization," rendering it exempt from the Act's electioneering communications provision. *See Fed. Election Comm'n v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 262 (1986) (holding certain non-profit advocacy corporations – now known as *MCFL* organizations – exempt from an earlier version of the Act's limits on corporate expenditures); *McConnell*, 540 U.S. at 209-11 (holding that the

current Act's electioneering communications provision contains the same exemption); *see also* 11 C.F.R. § 114.10. To qualify as an *MCFL* organization, a corporation must not "engage in business activities"; on the other hand, it may obtain donations, at least under some circumstances, through "garage sales, bake sales, dances, raffles, and picnics." *Mass. Citizens*, 479 U.S. at 255, 264. The League, however, has submitted invoices that evidence its receipt of revenue from the sale of advertising space in its newsletter, *The Recorder*. We conclude that the League has submitted evidence sufficient, on the present record and under the present time constraints, to demonstrate that it will suffer injury in fact.[3] *See Lujan*, 504 U.S. at 560.

The Commission does not challenge the League's standing on other grounds, and we hold that the League has standing because it also meets the causation and redressibility prongs of the standing test. *See id.*

B. Preliminary Injunction.

It is well-settled that, in order to obtain a preliminary injunction, the movant bears the burden of demonstrating:

(1) "a substantial likelihood of success on the merits," *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995);

(2) "that it would suffer irreparable injury if the injunction is not granted," *CityFed Fin.*, 58 F.3d at 746;

(3) "that an injunction would not substantially injure other interested parties," *id.*; and

(4) "that the public interest would be furthered by the

---

[3]The Commission argues that, in order to establish its standing, the League must seek an advisory opinion from the Commission on whether it nonetheless qualifies as an *MCFL* organization, thereby obviating any occasion for the Commission to become involved. At oral argument, however, the Commission could offer no assurance that it could provide such an opinion before May 14 when the relevant blackout period begins.

injunction," *id.*

In the present case, each of the four preliminary injunction factors counsels against the grant of the requested injunction.

1. Substantial Likelihood of Success on the Merits.

The League has not demonstrated a "substantial likelihood of success on the merits." *CityFed Fin.*, 58 F.3d at 746. On the one hand, enforcement of the electioneering communications provision to bar the League's proposed advertisement appears problematic under the First Amendment. The First Amendment protects corporate speech, at least where that speech pertains to "[a] matter[] of public concern." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-78, 790-96 & n.31 (1978) (quotation marks omitted). The League, the relevant corporation here, is a non-profit civic organization. Its proposed advertisement would address a legislative issue at a time when that issue is likely to be under consideration in the Senate. And the advertisement does not mention Senator Snowe's candidacy, which is unopposed.

Nevertheless, the electioneering communications provision, even in its application to the proposed advertisement, appears narrowly tailored to serve a compelling governmental interest. Particularly after *McConnell*, there can be no question that the governmental interest in maintaining the integrity of the electoral process is compelling. The Court recognized: "'[T]o say that Congress is without power to pass appropriate legislation to safeguard an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.'" 540 U.S. at 223-24 (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934)). It held: "The latter question – whether the state interest is compelling – is easily answered by our prior decisions regarding campaign finance regulation, which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205

(quotation marks omitted).[4] The League's status as a nonprofit, ideological corporation does not blunt this interest. *See Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 152-63 (2003).

The Act appears narrowly tailored as well with respect to the League proposal to pay for the broadcast of its advertisement from its corporate funds. Again in the words of the *McConnell* Court: "Because corporations can still fund electioneering communications with [political action committee] money, it is simply wrong to view the [electioneering communications] provision as a complete ban on expression rather than a regulation." 540 U.S. at 204 (quotation marks omitted). Rather, the "ability to form and administer separate segregated funds . . . has provided corporations . . . with a constitutionally sufficient opportunity to engage in express advocacy." *Id.* at 203. Here, the Act does not bar the proposed advertisement; it only requires that the League fund it through a political action committee. Alternatively, the League may publish the advertisement with its own general corporate funds (i.e., without the use of a political action committee) so long as it uses a medium other than "broadcast, cable, or satellite," e.g., newspapers, leaflets, e-mails, telephone banks. 2 U.S.C. § 434(f)(3)(A)(i). Or the League could publish the advertisement, as a "broadcast, cable, or satellite" communication and using its general corporate funds, if it refrained from "clearly identif[ying]" Senator Snowe. *Id.* As the *McConnell* Court concluded: "[C]orporations and unions may finance genuine issue ads during th[e blackout] time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206.

Additionally, the advertisement that the League seeks to

---

[4]For over a quarter of a century, Congress has legislated to restrict political expenditures by corporations – restrictions that do not and probably could not apply to individuals. *See, e.g.*, *McConnell*, 540 U.S. at 115-33.

broadcast appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*. *See* 540 U.S. at 94, 126-27. The Supreme Court has explicitly acknowledged that "issue advertisements" that do not directly exhort citizens to vote for or against a particular candidate may have that effect. *See id.* at 126-29, 189-94, 203-11. Indeed, the League's advertisement – which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as "[u]nfortunate[]" – is the sort of veiled attack that the Supreme Court has warned may improperly influence an election. *See id.* at 126-27. Here, the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection. *See* Oral Arg. Tr. at 41-42. The League's own newsletter has already sounded an enthusiastic note regarding a potential challenger to Senator Snowe:

> Representative Duprey is the courageous third-term legislator who is the State House's most faithful defender of traditional marriage. Here, Representative Duprey announces for the first time that he is willing to run against Senator Olympia Snowe in next year's Republican primary. The Record is proud to be the first publication in Maine to provide you with this information.

Commission Opp'n Br., Ex. A (Apr. 5, 2006 dep. of the League) at Ex. 8 (excerpt from Feb. 23, 2005 League newsletter).

Moreover, the League's proposed "grass roots lobbying" exception would seriously impair the government's compelling interest in protecting the integrity of the electoral process. For example, candidates or their allies could easily schedule an issue for "legislative consideration" during the run-up to an

election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement. In such a scenario, a scheduled hearing on "family values" might re-authorize even the Bob Yellowtail advertisement. Given these considerations, the League has not established a substantial likelihood of success on the merits.

2. Irreparable Injury From Denial of the Injunction.

The League has also failed to establish that "it would suffer irreparable injury if the injunction is not granted." *CityFed Fin.*, 58 F.3d at 746. It retains ready options for communicating its message regarding the Marriage Protection Amendment, consistently with the Act.

The facts as presently developed strongly suggest that the League will not suffer irreparable, or even significant, harm in the absence of the requested injunction:

(1) The League can broadcast the same advertisement by funding it through a political action committee. *See* 2 U.S.C. § 441b(b)(2). The League would enroll its individual donor in the political action committee and have him or her direct the donation through that committee rather than into its general corporate funds.

(2) The League could publish the text of the advertisement in a medium other than "broadcast, cable, or satellite," such as newspapers, leaflets, e-mails, telephone banks. 2 U.S.C. § 434(f)(3)(A)(i).

(3) The League could refrain from "clearly identif[ying]" Senator Snowe in the advertisement. *Id.*

As the three-judge district court concluded in the factually analogous *Wisconsin Right to Life v. Federal Election Commission*, No. 04-1260, slip op. at 7 (D.D.C. Aug. 17, 2004): "[T]he actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues."

Nor can the League benefit from the presumption that injury

from a First Amendment violation is irreparable. In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Supreme Court stated: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." At this point, however, the League has established neither a First Amendment violation nor even the substantial likelihood of such a violation. Irreparable injury does not follow from "merely *alleg[ing]* the violation of First Amendment rights." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (emphasis in original).

3. Substantial Injury From Grant of the Injunction.

The League's requested preliminary injunction would "substantially injure other interested parties." *CityFed Fin.*, 58 F.3d at 746. Specifically, it would injure the Commission and the public. "The presumption of constitutionality which attaches to every Act of Congress is . . . an equity to be considered . . . in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). As the *Wisconsin Right to Life* district court concluded:

> The harm to the opposing party, the Federal Election Commission, is evident. Everyone agrees that it is the statutory duty of the defendant to enforce the [Bipartisan Campaign Reform Act of 2002]. . . . We hold that an injunction against the performance of its statutory duty constitutes a substantial injury to the Commission
>
> . . . .

No. 04-1260, slip op. at 8 (D.D.C. Aug. 17, 2004).

4. Furtherance of the Public Interest.

Finally, the League has failed to establish that "the public interest would be furthered by the injunction." *CityFed Fin.*, 58 F.3d at 746. In the words again of the three-judge district court in *Wisconsin Right to Life*:

> [W]e do hold that the plaintiff has not established that the public interest would be furthered by the injunction. The Supreme Court has already determined that the provisions of the [Bipartisan Campaign Reform Act of 2002] serve compelling government interests. *See McConnell*, 125 S. Ct. at 695-96. To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

No. 04-1260, slip op. at 8-9 (D.D.C. Aug. 17, 2004).

III. CONCLUSION

For the foregoing reasons, an accompanying Order denies the League's motion for a preliminary injunction.

/s/
Judith W. Rogers
UNITED STATES CIRCUIT JUDGE

/s/
Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

/s/
Colleen Kollar-Kotelly
UNITED STATES DISTRICT JUDGE

DATED: May 9, 2006

[file mark: May 9, 2006]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., Plaintiff,	) Civil Action No. 06-0614 (JWR, LFO, CKK) (Three-Judge Court)
v.	
FEDERAL ELECTION COMMISSION, Defendant,	
and	
JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, Intervenor-Defendants.	

ORDER

For the reasons stated in an accompanying Memorandum Opinion, it is this 9th day of May, 2006, hereby:

ORDERED: that the plaintiff's motion for preliminary injunction [Docket No. 4] is DENIED; and it is further

ORDERED: that the parties shall CONFER and SUBMIT, by May 22, 2006, a joint plan for the further administration of this case.

/s/
Judith W. Rogers
UNITED STATES CIRCUIT JUDGE

/s/
Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

/s/
Colleen Kollar-Kotelly
UNITED STATES DISTRICT JUDGE

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection –

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which

–

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons –

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 441b(a)-(b)(2)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for

any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication,

but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

BCRA § 403(a), 116 Stat. at 113-14

Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section –

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate

in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons –

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site

indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means –

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's

protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour –

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional

district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that –

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communi-

cation other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

11 C.F.R. § 114.2(a)-(b)

§ 114.2 Prohibitions on contributions and expenditures.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local, State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited form making expenditures as defined in 11 FR 114.1(a) for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(A) The committee is not a political committee as defined in 11 CFR 100.5;

(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

11 C.F.R. § 114.14

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation or labor organization, or received by a person, that constitute --

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or

otherwise provided an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

[file mark: "Received – May 11, 2006"]
United States District Court
District of Columbia

The Christian Civic League of Maine, Inc., 70 Sewall Street Augusta, ME 04330, ***Plaintiff,*** *v.* **Federal Election Commission,** 999 E Street, NW Washington, DC 20463, ***Defendant.***	**Cause No.** 1:06CV00614 (JWR, LFO, CKK) THREE-JUDGE COURT

Notice of Appeal of Denial of Motion for Preliminary Injunction to United States Supreme Court

Plaintiff, The Christian Civic League of Maine, Inc. (the "League"), hereby gives notice that it appeals to the United States Supreme Court from this Court's *Memorandum Opinion* (Docket #30, dated and filed May 9, 2006) and *Order* (Docket #31, dated and filed May 9, 2006) which denied the League's Motion for Preliminary Injunction and is effectively a final decision in the matter.

Appeal is taken pursuant to 28 U.S.C. § 1253 (providing for direct appeal to the Supreme Court from decisions of three-judge courts denying an interlocutory injunction) and Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the "final decision" of this District Court).

Dated May 12, 2006

Respectfully submitted,

/s/ Michael S. Nadel
M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

/s/ James Bopp, Jr.
James Bopp, Jr.*
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff
Admitted Pro Hac Vice

FILED
AUG 11 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 05-1447

In the Supreme Court of the United States

CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
APPELLANT

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM FOR THE FEDERAL ELECTION COMMISSION

LAWRENCE H. NORTON
General Counsel
RICHARD B. BADER
Associate General Counsel
DAVID KOLKER
Assistant General Counsel
HARRY J. SUMMERS
Attorney
Federal Election Commission
Washington, D.C. 20463
(202) 694-1650

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. GARRE
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether appellant's appeal from the denial of a preliminary injunction is moot.

2. Whether the three-judge district court abused its discretion in denying appellant's request for a preliminary injunction against enforcement of the federal statutory prohibition on the use of corporate treasury funds to finance "electioneering communications."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 13
Conclusion 26

TABLE OF AUTHORITIES

Cases:

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) 6
Bowen v. *Kendrick*, 483 U.S. 1304 (1987) 25
Buckley v. *Valeo*, 424 U.S. 1 (1976) 4
Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 17
FEC v. *Beaumont*, 539 U.S. 146 (2003) 3, 6
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 3, 4
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 3
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 15
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 14
Gonzales v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) 17
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990) 13, 15

Cases—Continued: Page

McConnell v. *FEC*:
540 U.S. 93 (2003) ..... *passim*
251 F. Supp. 2d 176 (D.D.C. 2003) 19
Murphy v. *Hunt*, 455 U.S. 478 (1982) 15
North Carolina v. *Rice*, 404 U.S. 244 (1971) 14
Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972) 3
Southern Pac. Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 15
University of Tex. v. *Camenisch*, 451 U.S. 390 (1981) ... 18
Walters v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984) 18
Weinstein v. *Bradford*, 423 U.S. 147 (1975) 15
Wisconsin Right to Life, Inc. v. *FEC*:
542 U.S. 1305 (2004) 18
126 S. Ct. 1016 (2006) 2, 7, 20

Constitution, statutes, regulation and rule:

U.S. Const. Amend. I 21
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81:
§ 201, 116 Stat. 88 (2 U.S.C. 434 (Supp. III 2003)) . 21
§ 201(a):
116 Stat. 88 (2 U.S.C. 434(f)(3)(A)(i) (Supp. III 2003)) 5
116 Stat. 89-90 (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. III 2003)) 6

Statutes, regulation and rule—Continued: Page

§ 203, 116 Stat. 91-92 (2 U.S.C. 441b(b)(2) (Supp. III 2003)) ..... *passim*
§ 403, 116 Stat. 113 (2 U.S.C. 437h (Supp. III 2003)) 15
§ 403(a)(1), 116 Stat. 114 (2 U.S.C. 437h note (Supp. III 2003)) 10
Federal Election Campaign Act of 1971, 2 U.S.C. 431-455 (2000 & Supp. III 2003) 2
2 U.S.C. 431(9)(A)(i) 4
2 U.S.C. 431(17) 4
2 U.S.C. 437c(b)(1) 2
2 U.S.C. 437d(a)(7) 2
2 U.S.C. 437d(a)(8) 2
2 U.S.C. 437f 2
2 U.S.C. 438(a)(8) (2000 & Supp. III 2003) 2
2 U.S.C. 438(d) 2
2 U.S.C. 441a(a)(1)(C) (2000 & Supp. III 2003) ... 23
2 U.S.C. 441b 3, 4
2 U.S.C. 441b(a) 3
2 U.S.C. 441b(b) 5
2 U.S.C. 441b(b)(2) (2000 & Supp. III 2003) 5
2 U.S.C. 441b(b)(2)(C) (2000 & Supp. III 2003) ... 3, 6
2 U.S.C. 441b(b)(4)(A)-(C) 3
Internal Revenue Code, 26 U.S.C. 501(c)(4) 8

Regulation and rule—Continued: Page

11 C.F.R. 114.10 ..... 4, 8
Fed. R. Civ. P. 65(d) 25

Miscellaneous:

152 Cong. Rec. S5534 (daily ed. June 7, 2006) 12

In the Supreme Court of the United States

No. 05-1447

CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
APPELLANT

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM FOR THE FEDERAL ELECTION COMMISSION

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-13a) is reported at 433 F. Supp. 2d 81.

JURISDICTION

The decision of the three-judge district court was filed on May 9, 2006. A notice of appeal and the jurisdictional statement were filed on May 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

This case concerns the "electioneering communication" provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 203, 116 Stat. 91-

92. The provision prohibits corporations from using their general treasury funds to pay for any "electioneering communication,"defined as a communication that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 2 U.S.C. 441b(b)(2) (Supp. III 2003). This Court has sustained BCRA § 203 against a facial constitutional challenge, see *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), but has held that the provision is subject to as-applied challenges, see *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL*) (per curiam). Appellant filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to appellant's own broadcast advertisements. The three-judge district court denied appellant's request for preliminary injunctive relief. J.S. App. 1a-13a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431-455 (2000 & Supp. III 2003), and other federal campaign-finance statutes. See J.S. App. 2a. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and (d) (2000 & Supp. III 2003); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. III 2003). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the

express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210; 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of express electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (2000 & Supp. III 2003). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88

(2 U.S.C. 434(f)(3)(A)(i) (Supp. III 2003)).[1] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for any electioneering communications that it would like from that fund. See 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. III 2003).

3. In *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S.

---

[1] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. III 2003). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. In *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016 (2006) (*WRTL*) (per curiam), this Court considered an as-applied constitutional challenge to BCRA § 203's prohibition on the use of corporate treasury funds to finance electioneering communications. The three-judge district court in *WRTL* had construed this Court's decision in *McConnell* as foreclosing all such as-applied challenges. *Id.* at 1017-1018. This Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. *Id.* at 1018. The Court remanded the case to the district court to consider the merits of the plaintiff corporation's as-applied challenge in the first

instance. *Ibid.* That case is currently pending before the three-judge district court.[2]

5. Appellant Christian Civic League of Maine, Inc., is a nonprofit, nonstock Maine corporation. J.S. App. 1a. Appellant's complaint asserts that it is tax-exempt under Section 501(c)(4) of the Internal Revenue Code (26 U.S.C.), and that it is interested in "laws protecting traditional marriage" and other public issues. Compl. paras. 16, 20; see J.S. App. 1a. Appellant asserts that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. Compl. para. 22.

Appellant's complaint in the instant case was filed on April 3, 2006. Appellant alleged that it planned to run a particular radio advertisement "between May 10 and early June." Compl. paras. 11, 13. The text of the advertisement (known as the "Crossroads" advertisement) is as follows:

> Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman

---

[2] After this Court's remand in *WRTL*, the district court on April 17, 2006, set a schedule for expedited discovery and briefing. Discovery lasted approximately two months, including depositions of the defendants' expert witnesses, although a motion to compel is currently pending before the court. Summary judgment briefing will be completed by August 18, 2006, and oral argument in the district court is scheduled for September 18, 2006. In its April 17 scheduling order, the district court also ordered the parties to address what "live controversy" the court must adjudicate on remand, and the parties filed memoranda in response on May 1, 2006.

> has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

J.S. App. 1a-2a. Because "Senator Snowe [was] a candidate in a primary election scheduled for June 13, 2006," *id.* at 2a, the effect of specifically mentioning Senator Snowe under BCRA's electioneering-communications provisions was that the advertisement in question could not be financed with appellant's treasury funds if it was broadcast in Maine between May 14 and June 13, 2006.

The complaint in this case further alleged that appellant "intends to run materially similar grass-roots lobbying ads * * * when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Maine." Compl. para. 16. Appellant alleged that it "is concerned about a range of issues * * * that regularly have and will become issues in the legislative and executive branch." *Ibid.* Appellant alleged that, "[b]ecause the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a strong likelihood that [appellant's] need to broadcast grass-roots lobbying ads

will again coincide with the electioneering communications blackout periods." *Ibid.* Appellant sought preliminary and permanent injunctive relief against enforcement of BCRA § 203 with respect to both the specific advertisement referenced in the complaint and any other "electioneering communications by [appellant] that constitute grass-roots lobbying." Compl. 13. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

6. On May 9, 2006, the district court denied appellant's request for a preliminary injunction against enforcement of BCRA's restrictions on the financing of the "Crossroads" advertisement. J.S. App. 1a-15a.[3] The court concluded that "each of the four preliminary injunction factors counsels against the grant of the requested injunction." *Id.* at 8a.

In holding that appellant had failed to establish a likelihood of success on the merits, the district court observed that BCRA "does not bar the proposed advertisement; it only requires that [appellant] fund it through a political action committee." J.S. App. 9a. The court found that the "ability to form and administer sep-

---

[3] In a footnote, the district court observed that appellant's request for a preliminary injunction extended beyond the "Crossroads" advertisement to "encompass 'any electioneering communications by [appellant] that constitute grass-roots lobbying.'" J.S. App. 3a n. 1 (quoting Compl. 13). The court observed, however, that appellant had "fail[ed] to define 'grassroots lobbying' (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction." *Ibid.* The court concluded on that basis that appellant's "request for the broader preliminary injunction [was] unwarranted." *Ibid.* The remainder of the court's opinion therefore addressed appellant's request for preliminary injunctive relief only insofar as that request pertained to the "Crossroads" advertisement. See *ibid.*

arate segregated funds . . . has provided corporations . . . with a constitutionally sufficient opportunity to engage in express advocacy." *Ibid.* (quoting *McConnell*, 540 U.S. at 203). The court further explained that appellant could have financed the advertisement with corporate treasury funds if it had used a non-broadcast medium or had refrained from clearly identifying Senator Snowe. See *ibid.*

The district court also noted that appellant's advertisement

> appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*. * * * [T]he advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection.

J.S. App. 10a (citation omitted). The court observed that a newsletter published by appellant had "already sounded an enthusiastic note regarding a potential challenger to Senator Snowe." *Ibid.* In addition, the court concluded that appellant's proposed "grassroots lobbying" exception to the coverage of BCRA § 203 "would seriously impair the government's compelling interest in protecting the integrity of the electoral process" because "candidates or their allies could easily schedule an issue for 'legislative consideration' during the run-up to an election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement." *Id.* at 10a-11a.

The district court also held that appellant had failed to demonstrate that it would suffer irreparable harm absent a preliminary injunction because, notwithstanding BCRA's restrictions on "electioneering communications," the various alternative means the court had described were available for communicating appellant's views concerning the Marriage Protection Amendment. J.S. App. 11a. The court further concluded that issuance of the requested preliminary injunction would substantially injure the Commission and would disserve the compelling public interest in the enforcement of BCRA. *Id.* at 12a-13a.

7. On May 12, 2006, appellant filed a jurisdictional statement in this Court and moved for expedited disposition of its appeal. In its Motion to Expedite and Consolidate Briefing (Mot. to Expedite), appellant stated that a Senate vote on the Marriage Protection Amendment was expected to occur "on or about June 5, 2006." *Id.* at 2. The motion further stated that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." *Ibid.* The FEC opposed that motion, arguing that expedited consideration was unwarranted even though "the question whether the district court should have issued a *preliminary* injunction is likely to become moot before the Court can resolve the merits of [appellant's] current appeal." FEC Opp. to Mot. to Expedite 5.

On May 15, 2006, this Court denied appellant's motion to expedite the appeal. 126 S. Ct. 2062. On June 7, 2006, a vote to invoke cloture on the proposed Marriage Protection Amendment failed in the United States Senate, effectively terminating Senate consideration of the measure. See 152 Cong. Rec. S5534 (daily ed).

8. Since May 15, 2006, the parties have, inter alia, filed a joint report and memoranda about how the case should proceed before the district court, including various scheduling and discovery proposals. Although appellant moved that proceedings in the district court be held in abeyance pending this Court's disposition of the jurisdictional statement, the district court denied that motion. The Commission subsequently answered appellant's complaint regarding the "Crossroads" advertisement and moved to dismiss appellant's claims concerning future, hypothetical "grassroots lobbying." The intervenors moved for partial judgment on the pleadings. On June 23, 2006, the court stayed discovery, set a schedule for addressing jurisdictional issues, and ordered the parties to address the question whether the "Crossroads" portion of the case is moot. A hearing on the jurisdictional questions was held on August 8, 2006.

ARGUMENT

Appellant challenges the district court's denial of a preliminary injunction, arguing that BCRA § 203's ban on the use of corporate treasury funds to finance "electioneering communications" is unconstitutional as applied to the "Crossroads" advertisement and to "genuine grassroots lobbying generally." See J.S. i. Because appellant's request for a preliminary injunction is now moot, the appeal should be dismissed. In the alternative, the judgment of the district court denying a preliminary injunction should be affirmed.

1. a. "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Because appellant previously disavowed any intent to broadcast the "Crossroads" advertisement

after the Senate vote on the Marriage Protection Amendment, and that vote has now occurred, the question whether the district court abused its discretion in denying preliminary injunctive relief with respect to the "Crossroads" advertisement is moot and is therefore no longer suitable for judicial resolution. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) ("Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence."). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis*, 494 U.S. at 477 (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Id.* at 477-478.

In moving for expedited consideration of its appeal, appellant specifically represented to this Court that a Senate vote on the proposed Marriage Protection Amendment was expected in early June and that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." Mot. to Expedite 2. The Senate has now terminated its consideration of the Marriage Protection Amendment, and no subsequent Senate vote on that measure is expected to occur in the foreseeable future. And because appellant chose not to run the "Crossroads" advertisement during the 30-day period before the June Senate primary election in Maine, it is not subject to any potential future Commission enforcement action whose validity might turn on the

determination whether BCRA's financing restrictions are constitutional as applied to that advertisement. Accordingly, appellant's request for a preliminary injunction against FEC enforcement of BCRA § 203 with respect to the "Crossroads" advertisement at issue in this case is no longer the subject of a live controversy.

b. This Court has recognized an exception to mootness principles for disputes that are "capable of repetition, yet evading review." See *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The Court has applied that exception, however, only when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis*, 494 U.S. at 481 (internal citation omitted) (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982)). For an alleged wrong to be considered "capable of repetition," "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978).

That exception provides no basis for this Court to review the district court's denial of *preliminary* injunctive relief in this case. Appellant's request for a *permanent* injunction against enforcement of BCRA § 203's financing restrictions is currently pending before the district court, which is required by BCRA § 403, 116 Stat. 113, to give expedited consideration to appellant's constitutional challenge. If appellant can establish a live controversy as to its request for a permanent injunction—*i.e.*, if appellant can demonstrate a likelihood that

it will again seek to finance the "Crossroads" advertisement during the 30- or 60-day period before a Maine election in which Senator Snowe or Senator Collins is a candidate—then it presumably may obtain a district court ruling on the merits of its constitutional challenge, subject to review by this Court.

Thus, if the current dispute is indeed capable of repetition, there is no reason to suppose that it will evade review. On appeal from a final judgment, moreover, the question of BCRA § 203's constitutionality as applied to the "Crossroads" advertisement would be squarely presented, without regard to the other factors that bear on the propriety of the district court's denial of temporary relief.[4] And if petitioner cannot establish a sufficient

---

[4] If this Court were to note probable jurisdiction over appellant's current appeal, its consideration of the underlying constitutional question could be complicated by the applicability of an abuse-of-discretion standard; by the need to consider the additional factors that supported the district court's denial of preliminary relief; and by the inadequacy of the evidentiary record that was before the district court at the time that court denied preliminary relief. As the government explained in the district court and in our opposition to appellant's motion to expedite the appeal, the Commission seeks to compile a record addressing a narrow range of topics concerning the purpose and likely effect of appellant's planned advertisement, such as the organization's decision about where, when, and how to run the advertisement; appellant's prior use of broadcast and other media for its public communications; the relationship between matters raised in the "Crossroads" advertisement and Senator Snowe's candidacy for reelection; and appellant's prior expressions of support for or opposition to Senator Snowe. In addition, the Commission may seek expert testimony as to the likely effect of appellant's advertisement in Maine's electoral climate, the importance of identifying office holders in grassroots lobbying advertisements, and whether a grassroots lobbying exemption like the one appellant now seeks would likely enable political consultants to craft electioneering advertisements that would circum-

likelihood that it will again seek to broadcast the "Crossroads" advertisement in circumstances that render BCRA § 203 applicable, it cannot invoke the "capable of repetition, yet evading review" exception to mootness principles in any event.

c. The mootness defect is not an unforeseen development. In its opposition to appellant's extraordinary request for expedited review, the FEC explained that denial of that request would likely result in appellant's appeal of the denial of preliminary injunctive relief becoming moot before the Court could resolve the merits of that appeal. See FEC Opp. to Mot. to Expedite 5.

2. If the Court concludes that this appeal is not moot, it should affirm the three-judge district court's order denying appellant's request for a preliminary injunction. In determining whether to issue a preliminary injunction, a district court considers the plaintiff's likelihood of success on the merits, whether the plaintiff will suffer irreparable injury in the absence of an injunction, the prospect of injury to other parties if an injunction is entered, and the public interest in granting or withholding temporary relief. J.S. App. 7a-8a; see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). This Court reviews the district court's application of the preliminary-injunction factors under an abuse-of-discretion standard. See *id.* at 931-932; *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1219 (2006). The district court correctly held that "each of the four preliminary injunction factors counsels against the grant of the requested injunction." J.S. App. 8a. At

---

vent regulation during the "electioneering communication" periods defined by the Act. Factual development with respect to such considerations could be important to the ultimate disposition of appellant's as-applied challenge.

a bare minimum, the district court did not abuse its discretion in concluding that interim relief was unwarranted.

a. In contending that the district court abused its discretion by denying preliminary injunctive relief against enforcement of BCRA § 203, appellant bears a particularly heavy burden. Appellant's effort to alter the status quo by seeking an exemption from BCRA's coverage is contrary to the established principle that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). In addition, this Court's holding in *McConnell* that BCRA § 203 is constitutional on its face greatly strengthens "[t]he presumption of constitutionality which attaches to every Act of Congress." *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). In denying an injunction pending appeal against enforcement of BCRA with respect to a particular set of political advertisements, Chief Justice Rehnquist recently explained that "[a]n injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional." *Wisconsin Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1305-1306 (2004) (in chambers) (citing *McConnell*, 540 U.S. at 189-210).

b. As the district court correctly held (J.S. App. 8a-11a), appellant is not likely to succeed on the merits of its contention that BCRA § 203 is unconstitutional as applied to the "Crossroads" advertisement.

i. The fact that the "Crossroads" advertisement is phrased as a request that citizens contact their repre-

sentatives to express a view on a pending legislative matter does not insulate the advertisement from BCRA's "electioneering communications" provision. In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact their elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address. The record before the district court in *McConnell* likewise reflected the understanding of current and former Members of Congress that such advertisements were routinely used to influence electoral outcomes. See, *e.g.*, *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 532-533 (D.D.C. 2003) (Kollar-Kotelly, J.).

Moreover, Congress specifically opted for a bright-line definition of "electioneering communication" that would give speakers clear notice of what communications must be funded through a separate segregated account. That definition avoids the sort of intractable line-drawing that a less determinate standard would require. It is undisputed that the "Crossroads" advertisement falls within the Act's definition of an "electioneering communication."

ii. In upholding BCRA § 203 against a facial constitutional attack, the Court in *McConnell* explained that

corporations and unions could "finance genuine issue ads during [pre-election] time-frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. In the instant case, the district court relied in part upon the existence of those alternatives in concluding that appellant was unlikely to prevail on the merits of its as-applied challenge. See J.S. App. 9a. Appellant contends (J.S. 26) that this aspect of the district court's analysis "ignores the plain implication of" *WRTL*. Appellant's reliance on *WRTL* is misplaced. The Court in *WRTL* held only that as-applied challenges to BCRA § 203 are not categorically precluded by *McConnell*. See 126 S. Ct. at 1018. The Court did not define the circumstances, if any, under which such challenges could succeed, but instead remanded the case to the district court to consider the merits of WRTL's constitutional claim in the first instance. See *ibid.*

iii. In concluding that appellant was unlikely to prevail on the merits of its constitutional claim, the district court did not simply rely on this Court's holding in *McConnell* that BCRA § 203 is constitutional on its face. Rather, the court examined the specific advertisement that appellant proposed to run and concluded that the "Crossroads" advertisement "appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*." J.S. App. 10a. The district court explained that "[appellant's] advertisement—which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as '[u]nfortunate[]'—is the sort of veiled attack that [this] Court has warned may improperly influence an election." *Ibid.* (citing *McConnell*, 540 U.S. at 126-127). The district court observed that "the advertisement might have the effect of encouraging

a new candidate to oppose Senator Snowe [or] reducing the number of votes cast for her in the primary." *Ibid.* The court noted as well that appellant's newsletter had previously "sounded an enthusiastic note regarding a potential challenger to Senator Snowe." *Ibid.*[5]

iv. BCRA §§ 201 and 203 establish a bright-line, objective standard for identifying the broadcast communications that are subject to the Act's financing restrictions. That clarity serves compelling governmental interests and was critical to the Court's upholding of the restriction against the First Amendment challenge. See *McConnell*, 540 U.S. at 194. Appellant's approach, by contrast, would reintroduce the indeterminacy that Congress and this Court have sought to dispel.

In support of its contention (J.S. 25) that the "Crossroads" advertisement is "not express advocacy or its functional equivalent," appellant identifies (J.S. 25-26) several aspects of the advertisement's text. Appellant does not explain, however, whether it views all of those factors as necessary to establish entitlement to a constitutional exemption from BCRA's coverage, or how or whether the factors should be weighed against each other. And while appellant asserts (J.S. 24 n.12) that

---

[5] The "Crossroads" advertisement's characterization of Senator Snowe's prior vote as "[u]nfortunate[]" renders it analogous to the "Jane Doe" advertisement described in *McConnell*. See 540 U.S. at 126-127; p. 19, *supra*. Although appellant describes this feature of the advertisement as a "mild statement about the differing positions of [appellant] and the Senators on the constitutional amendment" (J.S. 27), appellant has identified no workable standard for distinguishing among advertisements based on the level or intensity of criticism they contain. And while Senator Snowe ran unopposed in the June primary election, nothing in *McConnell* suggests that the constitutionality of BCRA § 203 as applied to a particular advertisement turns on the likelihood that the advertisement will be outcome-determinative.

"this Court could adopt a bright-line test for grass roots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL*," appellant makes no effort to articulate such a standard. Appellant's approach would encourage politically motivated pre-election as-applied challenges (with an attendant right of direct appeal to this Court) involving advertisements meeting the definition of "electioneering communication"; it would blur the bright lines drawn by Congress; and it would markedly subvert Congress's compelling interest in avoiding "the vagueness concerns that drove [the Court's] analysis in *Buckley*." *McConnell*, 540 U.S. at 194.

c. As the district court correctly held (J.S. App. 11a-12a), appellant failed to demonstrate that it would suffer irreparable harm from the denial of a preliminary injunction. Although BCRA prohibits the use of corporate treasury funds to finance electioneering communications, corporations remain free to finance such communications through a PAC, see *McConnell*, 540 U.S. at 204, and they may use treasury funds to run advertisements in other media and to "finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates," *id.* at 206. It is undisputed that those avenues remain open and available to appellant.

The minimal nature of BCRA's impact on issue advertising is particularly apparent in the circumstances presented here. Appellant has represented that the cost of the proposed "Crossroads" advertising campaign would have been $3992, and that one individual donor had committed to pay for the campaign in its entirety. See J.S. App. 6a. Because the projected cost of the campaign was lower than the $5000 annual limit on individ-

ual donations to PACs (see 2 U.S.C. 441a(a)(1)(C) (2000 & Supp. III 2003)), appellant's donor could have become a member of the corporation and could then have been solicited to direct his donation to appellant's political action committee rather than to its general treasury.

Indeed, because BCRA's restrictions on the financing of electioneering communications do not apply to individuals, appellant's prospective donor could simply have paid for the advertisement himself without using the corporation as a conduit. See J.S. 14 (recognizing that "the individuals who make up [appellant] could engage in electioneering communications," and that even BCRA's disclosure requirements apply only if an individual's spending "exceeds $10,000 in a calendar year"). The practical concern on which appellant's constitutional claim is premised—*i.e.*, that individuals should not be hindered from pooling their resources to "form themselves into an effective advocacy group for lobbying" (*ibid.*)—therefore is not implicated on the facts of this case. Regardless of the legal significance of the availability of the various alternative means of communication with respect to the ultimate merits of appellant's as-applied challenge, the existence of those alternatives is directly relevant at this preliminary-injunction stage of the case because they underscore that appellant has failed to establish any basis for overturning the district court's finding of no irreparable harm.[6]

---

[6] The circumstances under which this lawsuit was initiated further suggest that the denial of preliminary injunctive relief places insubstantial constraints on appellant's own communicative freedoms. As the FEC explained in its opposition to appellant's motion for a preliminary injunction (at 6-7), appellant filed this lawsuit ten days after an official of the Colorado group Focus on the Family sent an e-mail to leaders of a number of organizations, including appellant's executive director. No

d. The district court also correctly held (J.S. App. 12a-13a) that issuance of a preliminary injunction would cause irreparable harm to the Commission and would disserve the public interest. Enforcement of BCRA (and federal campaign-finance laws generally) is entrusted by statute to the FEC, and an injunction that barred the Commission from performing its statutory duties would substantially injure the agency. See *id.* at 12a.

Such an injunction would likewise subvert the public interest in the enforcement of duly enacted laws. As Chief Justice Rehnquist explained in staying a district court injunction against enforcement of a different statute:

---

record evidence suggests that appellant had previously planned to finance broadcast advertising this year. The subject line in that March 24, 2006, e-mail was "Possible legal action needed." Appellant Opp. to Motion for Preliminary Injunction Exh. B. The e-mail explained that the particular recipients had been selected "because [they were] in [states] that could be affected by McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. senators who are on the ballot." Approximately one hour later, appellant's executive director responded by e-mail with a message stating, "I will run an ad in that period of time mentioning Olympia Snowe." *Id.* at Exh. C. Focus on the Family subsequently provided appellant with the text of the advertisement that is at issue in this case.

The funding arrangement that appellant contemplated (see pp. 22-23, *supra*), whereby the advertisement was to be paid for not with pooled contributions, but with a donation from an individual who could have lawfully financed the advertisement himself, reinforces the inference that the planned advertising campaign is primarily a mechanism for engendering litigation. That fact does not necessarily impact the merits of the constitutional question, but it informs any judicial assessment of irreparable injury because it calls into question the true urgency of this matter to appellant itself and the likely harm that denial of preliminary relief would entail to its purported grassroots lobbying.

> The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the government] in balancing hardships. Given the presumption of constitutionality granted to all Acts of Congress, it is * * * appropriate that the statute remain in effect pending such review.

Bowen v. *Kendrick*, 483 U.S. 1304, 1304-1305 (1987) (Rehnquist, C.J., in chambers) (citations and internal quotation marks omitted); see p. 18, *supra*. The public interest in enforcement of BCRA § 203's financing restrictions is especially strong in light of this Court's holding in *McConnell* that those restrictions are valid on their face.

3. The preliminary injunction sought by appellant would have barred enforcement of BCRA § 203 not only with respect to the "Crossroads" advertisement, but also with respect to "any electioneering communications by [appellant] that constitute grass-roots lobbying." Compl. 13; see J.S. App. 3a n.1. The district court denied that aspect of appellant's request for preliminary injunctive relief on the ground that appellant had "fail[ed] to define 'grassroots lobbying' (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction." *Ibid.* Appellant's jurisdictional statement identifies no basis for concluding that the district court abused its discretion in that regard. To the contrary, appellant's continuing failure to articulate a clear and administrable definition of the term "grassroots lobbying" underscores the impropriety of any preliminary injunction incorporating that term. See Fed. R. Civ. P. 65(d)

("Every order granting an injunction * * * shall be specific in terms * * * [and] shall describe in reasonable detail * * * the act or acts sought to be restrained.").

CONCLUSION

The appeal should be dismissed as moot. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
Attorney
Federal Election Commission

AUGUST 2006

No. 05-1447

FILED
AUG 11 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee,

and

JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM OF INTERVENOR-APPELLEES SENATOR JOHN MCCAIN, SENATOR RUSS FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, AND REPRESENTATIVE TOM ALLEN

ROGER M. WITTEN
DAVID A. O'NEIL
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
RANDOLPH MOSS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

Additional Counsel Listed On Inside Cover

TREVOR POTTER
J. GERALD HEBERT
PAUL S. RYAN
CAMPAIGN LEGAL CENTER
1640 Rhode Island
Avenue, NW
Suite 650
Washington, DC 20036
(202) 736-2200

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DONALD J. SIMON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON &
PERRY, LLC
1425 K Street, NW
Suite 600
Washington, DC 20005
(202) 682-0240

FRED WERTHEIMER
DEMOCRACY 21
1875 I Street, NW
Suite 500
Washington, DC 20006
(202) 429-2008

CHARLES G. CURTIS, JR.
DAVID ANSTAETT
HELLER EHRMAN WHITE &
MCAULIFFE LLP
One East Main Street
Suite 201
Madison, WI 53703
(608) 663-7460

BRADLEY S. PHILLIPS
GRANT A. DAVIS-DENNY
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100

QUESTIONS PRESENTED

1. Whether this appeal is moot because the time period for which appellant sought preliminary injunctive relief has expired.

2. Whether the three-judge district court acted within its discretion in denying appellant's motion for a preliminary injunction against enforcement of the federal prohibition on the use of corporate treasury funds to finance "electioneering communications."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 2

ARGUMENT 10

I. THIS APPEAL IS MOOT BECAUSE THE PRELIMINARY INJUNCTION CCL SEEKS WOULD NO LONGER HAVE ANY EFFECT ON THE RIGHTS OR OBLIGATIONS OF THE PARTIES 10

II. THE UNANIMOUS DECISION OF THE THREE-JUDGE COURT IS CORRECT AND SHOULD BE SUMMARILY AFFIRMED 13

A. CCL Has Failed to Establish That It Will Likely Prevail on the Merits. 14

1. The Act's "Electioneering Communication" Provisions Further Compelling Governmental Interests by Prohibiting Corporate-Funded "Issue Ads" Broadcast with the Purpose and Effect of Influencing Federal Elections 15

2. Because the "Crosssroads" Ad Directly Implicates Those Compelling Interests, the Electioneering Communication Provisions Are Narrowly Tailored As Applied to That Ad 18

B. CCL Cannot Demonstrate That It Would Suffer Irreparable Harm Without Injunctive Relief 19

TABLE OF CONTENTS—Continued

Page

1. The "electioneering communications" regulations afford CCL ample means of disseminating its message 19

   a. CCL could easily have funded "Crossroads" through a PAC 19

   b. CCL could have disseminated its message consistent with FECA even if it insisted on drawing the necessary funds from its general treasury 21

2. The record in this case casts significant doubt on CCL's basis for seeking a preliminary injunction 22

C. Granting CCL's Preliminary Injunction Would Substantially Injure Other Parties and Disserve the Public Interest 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Page(s)

American Postal Workers Union v. *U.S. Postal Service*, 764 F.2d 858 (D.C. Cir. 1985) 13
Ashcroft v. *American Civil Liberties Union*, 542 U.S. 656 (2004) 13
Austin v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) 20
Buckley v. *Valeo*, 424 U.S. 1 (1976) 15, 24
CMM Cable Rep., Inc. v. *Ocean Coast Properties, Inc.*, 48 F.3d 618 (1st Cir. 1995) 12
Calderon v. *Moore*, 518 U.S. 149 (1996) 11
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 12
Federal Election Commission v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 15
Federal Election Commission v. *Beaumont*, 539 U.S. 146 (2003) 20
Hodges v. *Schinkert Sports Associates, Inc.*, 89 F.3d 310 (6th Cir. 1996) 11
Honig v. *Students of California School for the Blind*, 471 U.S. 148 (1985) 1, 11
Independence Party of Richmond County v. *Graham*, 413 F.3d 252 (2d Cir. 2005) 12, 13
McConnell v. *Federal Election Commission*, 540 U.S. 93 (2003) ..... *passim*
New Motor Vehicle Board v. *Orrin W. Fox Co.*, 434 U.S. 1345 (1977) 23
Thournir v. *Buchanan*, 710 F.2d 1461 (10th Cir. 1983) 12
Wisconsin Right to Life, Inc. v. *FEC*, 126 S. Ct. 1016 (2006) 3

STATUTES AND LEGISLATIVE MATERIAL

11 C.F.R. § 100.29 2
11 C.F.R. § 114.5(g) 21
11 C.F.R. § 114.7(a) 21
2 U.S.C. § 434(f) 2, 16

TABLE OF AUTHORITIES—Continued

Page(s)

2 U.S.C. § 441(a) 20
2 U.S.C. § 441(b) 2, 15, 20
16 Fed. Prac. & P. Juris. 2d § 3921.2 12

INTRODUCTION

In this appeal, plaintiff Christian Civic League of Maine, Inc., ("CCL") challenges the unanimous decision of a three-judge district court denying its motion for a preliminary injunction. CCL requested the preliminary injunction as part of an as-applied challenge to the electioneering communications provisions of the Federal Election Campaign Act ("FECA" or "Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). The underlying suit alleges that the Act is unconstitutional to the extent it prevented CCL from using its general treasury funds to broadcast, within 30 days of Maine's June 13, 2006, Republican primary election, a radio advertisement that referred to a clearly identified candidate in that election and criticized her position on a controversial issue. CCL sought a preliminary injunction permitting it to finance broadcasts of the ad with unrestricted funds from May 14, when the ad became an "electioneering communication" under FECA, until June 5, 2006, the scheduled date of a Senate vote on the federal Marriage Protection Amendment, which CCL's ad purported to address. The district court refused to grant the preliminary injunction, and this Court denied a request to expedite appeal of that decision. On June 7, the Senate considered and defeated the Marriage Protection Amendment. CCL never ran the proposed advertisement, and it has expressly disavowed any concrete plan to do so in the future.

This appeal is now moot. The time period for which CCL requested a preliminary injunction has passed. That injunction cannot turn back the clock, nor can it somehow undo the alleged "irreparable injury" that CCL sought to avoid through emergency relief. Because "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review," *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam), there is no subject matter jurisdiction over this appeal. Nor is there any basis for applying the "capable of repetition, yet evading review" exception to petitioner's request for *preliminary* relief. The issues in this case will not

"evade review" if this interlocutory appeal is dismissed. Those issues (including both the merits and the as-yet unresolved issue of whether the underlying controversy is moot) remain pending before the three-judge court. The district court's final judgment—whether based on the merits or on jurisdictional grounds—will be subject to statutory review in this Court at the appropriate time.

If this Court concludes that this appeal remains live, it Court should summarily affirm the decision below. The district court did not abuse its discretion in concluding that CCL failed to establish any of the requirements for preliminary injunctive relief. CCL has not demonstrated a likelihood of success on the merits, because the advertisement at issue exemplifies the type of communication that Congress has a compelling interest in regulating. CCL cannot show irreparable injury, because it retains ample means of propagating its message consistent with FECA. And CCL cannot establish that the proposed injunction would serve the public interest, which plainly lies in the FEC's ability to enforce an Act of Congress that this Court recently upheld against facial constitutional challenge.

STATEMENT

1. The "electioneering communication" provisions of FECA prohibit corporations and labor unions from using their general treasury funds to pay for any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and that is broadcast within either 30 days of a federal primary election or 60 days of a general election in the jurisdiction in which the named candidate is running. 2 U.S.C. §§ 441(b)(2), 434(f)(3); *see also* 11 C.F.R. § 100.29 (defining "electioneering communication"). This Court upheld the constitutionality of those provisions against a facial challenge in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003). Noting its longstanding "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," the Court "easily" concluded that compelling governmental interests support the prohibi-

tion on electioneering communications financed with general corporate funds. *Id.* at 205 (internal quotation marks omitted).

This Court reasoned in particular that the same justifications that support regulation of so-called "express advocacy" apply to broadcast advertisements that clearly refer to a candidate in the period before an election. To the extent such advertisements "are intended to influence the voters' decisions and have that effect," the Court explained, they are "the functional equivalent of express advocacy," *id.* at 206: "Little difference exist[s] . . . between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court also rejected as "simply wrong" the argument that the electioneering communications provisions imposed a "complete ban on expression," noting that "corporations can still fund electioneering communications with PAC money." And the Court reasoned that "in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206.

In *Wisconsin Right to Life* v. *FEC, Inc.*, 126 S. Ct. 1016 (2006), this Court clarified that its decision in *McConnell* upholding the electioneering provisions against facial attack "did not purport to resolve future as-applied challenges." *Id.* at 1018. The Court therefore left open the possibility that constitutional issues might arise from application of those provisions to "particular communications." *Id.* at 1017.

2. a. CCL commenced this action on April 3, 2006. According to the complaint, CCL intended to broadcast in early June 2006, a radio advertisement that referred to Senator Olympia Snowe, a candidate in Maine's June 13 Republican primary. The advertisement, entitled "Crossroads," began by warning listeners that "[m]arriage between a man and a woman has been challenged and could be declared unconstitutional at any time by rogue judges." The ad then con-

demned Senator Snowe's position on that issue by stating that she "unfortunately" "voted against the Marriage Protection Amendment two years ago." The ad closed by urging listeners to "call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June." J.S. App. 1a-2a.

The complaint conceded that this advertisement constituted an "electioneering communication" within the meaning of FECA, and therefore that the Act prohibited CCL from using general treasury funds to finance the ad's broadcast within 30 days of the primary election. CCL contended, however, that FECA could not constitutionally restrict the funding of such "grassroots lobbying" communications, which, according to CCL, do not implicate the interests supporting the Act's electioneering communication provisions. The complaint therefore sought a judgment declaring those provisions unconstitutional as applied to the advertisement. CCL also requested, in both its complaint and a separate motion filed the same day, the relief at issue here: a preliminary injunction permitting it to broadcast the "Crossroads" ad to Maine voters until the Senate's June 2006 vote on the Marriage Protection Amendment.[1]

b. The district court permitted extremely abbreviated discovery, lasting approximately one week and including only one deposition, with respect to the request for preliminary relief. The few facts that emerged in that period revealed that CCL's interest in sponsoring the "Crossroads" ad arose only after it was contacted by another group, Focus on the Family. On March 24, 2006, that organization sent to

---

[1] In addition, the complaint alleged that CCL intends to run advertisements "materially similar" to the "Crossroads" ad "before future primary and general elections in Maine," Compl., 4, and sought injunctive and declaratory relief with respect to such hypothetical "electioneering communications by CCL that constitute grass-roots lobbying," *id.* at 13. Neither the complaint nor the record contains any indication of the content of any such future ads or the circumstances in which CCL might wish to broadcast them. Those claims are the subject of dispositive motions currently pending before the district court. *See infra*, n.3.

a broad list of groups nationwide an email solitication entitled "Possible legal action needed." Ex. B. to FEC Opp. to Mot. for Prelim. Inj. The email stated that it was sent to certain groups "because [they were] in [states] that could be affected by the McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. senators who are on the ballot." *Id.* Attached to the email was a message from counsel, who offered to seek a federal court injunction at no charge on behalf of "any group" that would "step up" by running a "grass roots lobbying" ad during the electioneering communications period. Counsel further noted that "[t]his may even involve an appeal to the U.S. Supreme Court (which would result in a landmark ruling.)" *Id.* The email directed any recipient "willing to assist us in this matter" to contact counsel directly. *Id.*

Within an hour of receiving that email, CCL's executive director responded to counsel, stating, "I will run an ad in that period of time mentioning Olympia Snowe." Ex. C to FEC Opp. to Mot. for Prelim. Inj. Focus on the Family then sent CCL "hypothetical" information on advertising rates in Maine radio markets and also supplied CCL with the text of the "Crossroads" ad that was attached to the complaint CCL filed several days later in the court below. Heath Dep., Ex. A to FEC Opp. to Mot. for Prelim. Inj., at 46, 51, 59; Ex. D.

On April 13, 2006—ten days after this suit commenced—CCL executive director Michael Heath testified that CCL lacked the approximately $4,000 it estimated would be required to broadcast the "Crossroads" advertisement, had done nothing to record or produce it, had not contacted a single radio station about buying time to broadcast the ad, and did not know where or how often the ad would run. Heath Dep., Ex. A to FEC Opp. to Mot. for Prelim. Inj., at 46, 51-52, 54, 59, 65-68, 70, 73-74. Eight days later, CCL filed a supplemental declaration of Mr. Heath stating that CCL had located a single donor willing to contribute approximately $3,900 to finance the ad's broadcast. Heath Decl., Ex. A to Pl.'s Reply in Supp. of Mot. for Prelim. Inj., at 5.

3. Following expedited briefing, the three-judge district court unanimously denied CCL's motion for a preliminary injunction. In an opinion issued on May 9, 2006, the court held that CCL failed to meet the standard for obtaining such relief.

The court first concluded that CCL had not demonstrated a substantial likelihood of success on the merits. J.S. App. 8a. The panel observed that, "[p]articularly after *McConnell*, there can be no question that the governmental interest in maintaining the integrity of the electoral process is compelling." *Id.* The court then reasoned that FECA is "narrowly tailored" to serve that interest "with respect to the League proposal to pay for the broadcast of its advertisement from its corporate funds." *Id.* at 9a.

That was so, the court explained, for two primary reasons. First, the Act afforded CCL ample means to propagate its message: CCL could "fund [the ad] through a political action committee," "publish the advertisement [in] a medium other than 'broadcast, cable or satellite,'" or modify the ad so that it did not "clearly identify" Senator Snowe. *Id.* Second, the "Crossroads" ad "appears to be the functional equivalent to the sham issue advertisements identified in *McConnell*." Id. at 10a. In the court's view, the ad—"which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as '[u]nfortunate[]'—is the sort of veiled attack that the Supreme Court has warned may improperly influence an election." *Id.* Therefore, the court concluded, permitting corporate funding of such ads under the "proposed 'grass roots lobbying exception' would seriously impair the government's compelling interest in protecting the integrity of the electoral process." *Id.*

The Court then turned to the remaining requirements for preliminary injunctive relief, concluding that none was satisfied. CCL had failed to establish irreparable injury, the court reasoned, because "it retains ready options for communicating its message" consistent with FECA. *Id.* at 11a. Among other things, the court observed, CCL could simply enroll the single individual financing the ad in a PAC "and

have him or her direct the donation through that committee rather than into [CCL's] general corporate funds." *Id.* The court also concluded that the grant of a preliminary injunction would substantially injure the Commission in its efforts to enforce federal law and therefore disserve the public interest. *Id.* at 12a, 13a.[2]

4. a. CCL initiated this interlocutory appeal on May 11, 2006, and the following day filed both a Jurisdictional Statement and a request that this Court review the decision below on a highly expedited schedule. Such expedition was necessary, CCL argued, because if the appeal were heard in the usual course, "the League will lose its opportunity to broadcast ads in the days leading up to the Senate's anticipated June 5, 2006 vote on the federal Marriage Protection Amendment." Asserting that "[t]he League only wants to run the ad until the vote and not thereafter," CCL contended that it would be irreparably injured if it could not obtain a final decision before that date. This Court denied the motion to expedite on May 15, 2006.

b. On May 22, 2006, pursuant to a district-court order issued in conjunction with the denial of preliminary injunctive relief, the parties jointly submitted a statement containing their respective positions on further administration of the case. Both the FEC and Intervenor-Defendants urged the court to "use the time now available to build a [full factual] record so that this case is ready for a final decision at the earliest feasible time." Joint Report Pursuant to Order of May 9, 2006, at 5. CCL, in contrast, sought a stay of the district court proceedings, asserting that because "CCL presently has no concrete plans to run ads" in the future,

---

[2] The district court dismissed in a footnote CCL's request for "a preliminary injunction, unlimited time-wise, that would encompass 'any electioneering communications by [the League] that constitute grass-roots lobbying.'" J.S. App. 3a n.1. The court noted that because CCL had failed to identify the content of such future communications or to establish any necessity for relief in this regard, "its request for the broader preliminary injunction is unwarranted." *Id.*

"there is no longer any pressing need" for "resolution by this Court of the questions presented." *Id.* at 8.

The district court denied CCL's request for a stay and, following a status conference on June 5, 2006, ordered the parties to file another "plan for completion of discovery and dispositive motion briefing on the earliest practicable date." June 5 Order, at 1.[3] The FEC and Intervenor-Defendants again urged the court to press forward, proposing two alternative schedules that, in their view, "balance[d] the requirement for expedition with the need to develop an appropriate record": either six or nine weeks of discovery commencing on June 26, 2006, followed by summary judgment briefing on an expedited basis. Joint Report Pursuant to June 5 Order, at 2.[4] CCL again stated that because it "currently has no specific plans to run [any "grassroots lobbying"] ads between now and election day," *id.* at 2, "radical expedition is no longer warranted in this case," *id.* at 6.

c. Before the court acted on these proposals, it *sua sponte* issued an order expressing its view that "the Crossroads portion of the case . . . appears moot unless the 'capable of repetition yet evading review' exception applies." June 23 Order, at 1. "That exception may not apply," the court further suggested, "because the 'Crossroads' adver-

---

[3] Two days earlier, on June 13, 2006, the FEC moved to dismiss the portion of the case that does not involve the "Crossroads" ad, *i.e.*, those claims based on CCL's purported intent to run hypothetical ads in the future on undefined issues and at an unspecified time. *See supra*, at n.2. The motion argued that because those claims were entirely speculative, they did not present a ripe controversy suitable for adjudication. Intervenor-Defendants filed a corresponding motion for judgment on the pleadings, noting that, although they agreed with the FEC's contentions, the court could resolve the motions at the same time it addressed the merits. The district court ordered full briefing on these motions in an order issued May 23, 2006, and heard argument on August 8, 2006.

[4] Intervenor-Defendants indicated a preference for the more expeditious alternative in order to address the district court's concern that the case might become moot if it were not resolved before October 1, 2006. Joint Report Pursuant to June 5 Order, at 6.

tisement portion of the case—particularly in this fact-centered, as-applied challenge—may not be 'capable of repetition.'" *Id.* The court therefore ordered CCL to "show cause . . . why the 'Crossroads' portion of the case should not be dismissed as moot." The court also directed the FEC and Intervenor-Defendants to file papers addressing the same issue. *Id.*

CCL responded by arguing that the "Crossroads" claim was not moot because it fell within the "capable of repetition, yet evading review" exception. In particular, CCL contended that the as-applied challenge to FECA based on "Crossroads" was "capable of repetition" because CCL intended in the future to run what it called "materially similar" ads. Pl.'s Resp. to June 23 Order, at 1. CCL could specify nothing about those hypothetical advertisements and acknowledged that it had no concrete plans to develop or broadcast them. Instead, CCL stated that by "materially similar" ads, it "means that the ads' text, placement and timing would put them in contravention of the electioneering communication prohibition, just as the text, placement, and timing of the Crossroads ad put it in contravention of the electioneering communication prohibition." Pl.'s Opp. to FEC Mot. to Dismiss, at 6-7.

In briefs addressing the district court's suggestion of mootness and at oral argument on August 8, 2006, the FEC indicated that it considered it a "difficult" and "close question" whether the "capable of repetition, yet evading review" exception applied to the "Crossroads" claims. FEC Resp. to June 23 Order, at 1; Tr. (8/8/06), at 11. Although Intervenor-Defendants argued in their brief that CCL had not made a sufficient showing that the controversy was "capable of repetition," they also stated at argument that, in their view, the exception might well apply if CCL alleged that it intended to run ads like "Crossroads" when Congress considered the issue of same-sex marriage in a future pre-election period. *Id.* at 17, 20. What plainly did not suffice, Intervenor-Defendants contended, was CCL's general allegation of an intent to run ads that are "materially similar" to

"Crossroads" only in the sense that they meet FECA's definition of an "electioneering communication": such allegations would support only the *facial* challenge that this Court already resolved in *McConnell*, and therefore could not establish that the *as-applied* challenge presented by "Crossroads" was "capable of repetition." *Id.* at 18-20. Accordingly, Intervenor-Defendants argued that CCL had apparently failed on the current record to carry its burden of demonstrating the applicability of the exception. They also indicated, however, that "it was not [their] objective here to simply keep [CCL] out of court," and therefore that they would not oppose limited discovery on the question of CCL's intent regarding the broadcast of future ads. Intervenor-Defendants' Resp. to June 23 Order, at 8 n.2; Tr. (8/8/06), at 20. The district court reserved decision.

ARGUMENT

I. THIS APPEAL IS MOOT BECAUSE THE PRELIMINARY INJUNCTION CCL SEEKS WOULD NO LONGER HAVE ANY EFFECT ON THE RIGHTS OR OBLIGATIONS OF THE PARTIES

CCL's request for preliminary injunctive relief no longer presents a live controversy. The proposed injunction concerned a specific communication and a specific time period: CCL sought an order permitting it to broadcast the "Crossroads" advertisement from May 14, 2006, when that advertisement became an "electioneering communication" under FECA, until June 5, 2006, when the Senate had scheduled a vote on the federal Marriage Protection Amendment. That time period has expired, and CCL has explicitly disavowed any plans to broadcast the "Crossroads" ad in the future. CCL informed this Court in its motion to expedite that "[t]he League only wants to run the ad until the vote occurs and not thereafter"; that without expedited review, the League will "forever" lose its opportunity to broadcast the ad; and that "there is no need to run the grassroots lobbying advertisement after" the Senate vote. The Senate in fact defeated the Marriage Protection Amendment on June 7, and no additional vote on that legis-

lation is currently contemplated. CCL has since informed the district court that it "presently has no concrete plans to run ads beyond what it began on May 10." Joint Report Pursuant to May 9 Order, at 8; Joint Report Pursuant to June 5 Order, at 2 (stating that CCL "currently has no specific plans to run [any 'grass-roots lobbying'] ads between now and election day (November 7) that would be considered electioneering communications under the Federal Election Campaign Act").

The alleged "harm" that CCL sought to avoid through preliminary injunctive relief—losing the opportunity to broadcast its "Crossroads" advertisement prior to the Senate vote—has thus irrevocably occurred. *See* Joint Report Pursuant to June 5 Order, at 7 (noting that "[b]ecause the FEC was not enjoined from enforcing the electioneering communication prohibition against the broadcast of [Crossroads], the opportunity for the exercise of the commensurate First Amendment rights of speech and petition were irreparably lost"). As CCL has itself acknowledged, because a preliminary injunction could not restore that opportunity, "there is no longer any pressing need" for interim relief. Joint Report Pursuant to May 9 Order, at 8. Accordingly, "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review." *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam). Because this Court's review of the decision below therefore cannot serve any useful purpose, the appeal is moot. *See, e.g.*, *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (case must be dismissed as moot when the court "cannot grant 'any effectual relief whatever'") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)); *see, e.g.*, *Hodges* v. *Schinkert Sports Assocs., Inc.*, 89 F.3d 310, 312 (6th Cir. 1996) ("An appeal from the denial of a motion for preliminary injunction is mooted when the requested time period for the injunction has passed."); *Thournir* v. *Buchanan*, 710 F.2d 1461, 1463 (10th Cir. 1983) ("where an act sought to be enjoined has occurred, an appeal of a district court order denying an injunction is moot").

The exception to mootness doctrine for disputes that are "capable of repetition, yet evading review" does not apply to the request for preliminary injunctive relief, which is the sole subject of this appeal. CCL's complaint remains pending in the district court, which did not lose jurisdiction by virtue of this appeal. 16 Fed. Prac. & P. Juris. 2d § 3921.2. The legal issues underlying this appeal therefore in no sense "evade review." CCL's "requests for declaratory relief and for a permanent injunction raise the same underlying legal questions that are being argued in this appeal." *Independence Party of Richmond County* v. *Graham*, 413 F.3d 252, 256 (2d Cir. 2005). In addition, the as-yet unresolved issue of the mootness of the entire case remains pending in the district court. When the district court issues a final judgment—whether based on the merits or on jurisdiction—CCL may challenge any adverse ruling in this Court. *See Graham*, 413 F.23d at 256 ("There is no reason to believe that the issues raised by the [plaintiff's] request for permanent relief cannot be fully litigated before that court. And, in due course, following the entry of final judgment in that court, they can be reviewed on appeal in this court.").

Application of the "capable of repetition" doctrine is "wholly inappropriate" in these circumstances, moreover, for two additional reasons. *Id.* at 257. First, application of that exception to a request for interim relief would undermine the general rule, embodied in 28 U.S.C. § 1292(a), that appellate tribunals review only "final judgments" of lower courts. *See generally Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 & n. 8 (1978). "[T]he impetus behind the statutory exception to the final judgment rule that allows an immediate appeal of an order refusing a preliminary injunction is to prevent irreparable harm to a litigant who, otherwise, might triumph at trial but be left holding an empty bag." *CMM Cable Rep., Inc.* v. *Ocean Coast Props., Inc.*, 48 F.3d 618, 620 (1st Cir. 1995) (internal quotation marks omitted). As the Second Circuit has explained, however,

> [w]here the event giving rise to the necessity of preliminary injunctive relief has passed, the "harm-

> preventing function cannot be effectuated by the successful prosecution of an interlocutory appeal from the denial of interim injunctive relief." And, since the legal questions underlying the interlocutory appeal remain before the district court in the still-pending action, review by [an appellate] court would unnecessarily and inappropriately preempt the district court's resolution of the controversy before it. In such circumstances, application of the "capable of repetition yet evading review" exception to mootness would harm the principle of finality without securing any benefit to the administration of justice.

Graham, 413 F.3d at 256-257 (quoting *CCM Cable*, 48 F.3d at 621).

Second, consistent with BCRA's mandate that courts expedite constitutional challenges to the Act, § 403, Pub. L. No. 107-155, the district court has proceeded to hear argument on dispositive issues since this appeal was filed. *See supra*, at 9-10 & n.3. If this Court were nevertheless to entertain this appeal on a "capable of repetition" theory, the district court could easily reach a final decision on the merits before this Court resolved CCL's challenge to the denial of preliminary injunctive relief. Such a final district court decision would moot this appeal in any event, squandering this Court's time and resources. *See, e.g., American Postal Workers Union* v. *U.S. Postal Serv.*, 764 F.2d 858, 860 n.3 (D.C. Cir. 1985) (final judgment moots appeal from denial of preliminary injunction).

II. THE UNANIMOUS DECISION OF THE THREE-JUDGE COURT IS CORRECT AND SHOULD BE SUMMARILY AFFIRMED

If this Court concludes that this appeal remains live, it should summarily affirm the decision below. The district court did not abuse its discretion in denying the motion for a preliminary injunction. *See, e.g., Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of dis-

cretion standard on the review of a preliminary injunction.") (internal quotation marks omitted).[5] Preliminary injunctive relief is appropriate only if the plaintiff can establish (1) that it has "a substantial likelihood of success on the merits"; (2) that it "would suffer irreparable injury if the injunction is not granted"; (3) that an "an injunction would not substantially injure other interested parties"; and (4) that "the public interest would be furthered by the injunction." J.S. 7a-8a (quoting *CityFed Fin. Corp.* v. *Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)). As the district court correctly concluded, CCL has failed to satisfy any of these requirements.

A. CCL Has Failed to Establish That It Will Likely Prevail on the Merits

CCL invites the Court to decide the ultimate question of the constitutionality of applying BCRA to its proposed ad even though that issue was not decided by the district court when it denied the preliminary injunction. Rather, the district court, without having developed a full factual record, held only that CCL had not shown a likelihood of success on its ultimate constitutional claims. The only issue before this Court is whether, bearing in mind the preliminary posture of the case and the lack of full summary-judgment briefing on the merits, the three-judge court's ruling on that point reflected an abuse of discretion. CCL has not carried the burden of showing that the district court's reasoning with respect to likelihood of success, which followed closely from that of the majority of this Court in *McConnell*, reflected an abuse of discretion.

---

[5] CL asserts that the abuse-of-discretion standard should not apply here because of the emergency nature of the issue whether it may run the ads before June 5 and the prospect that its rights will be irrevocably lost if the issue were decided against it. Those reasons for abandoning the abuse-of-discretion standard, even if they ever had any merit, obviously do not survive the expiration of the Senate's vote on June 7.

1. The Act's "Electioneering Communication" Provisions Further Compelling Governmental Interests by Prohibiting Corporate-Funded "Issue Ads" Broadcast with the Purpose and Effect of Influencing Federal Elections

This Court has long recognized the strong governmental interests supporting Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations." *McConnell*, 540 U.S. at 117 (quoting *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 209 (1982)) (citations omitted). The "electioneering communication" provisions of BCRA, which this Court upheld against a facial challenge in *McConnell*, form a key component of that congressional effort, directly furthering the compelling goals of eliminating undue corporate influence on the federal electoral process and preventing evasion of FECA's expenditure limits.

BCRA represents the latest step in Congress's century-long experience in tailoring the federal campaign-finance laws to address the unique concerns posed by corporate-funded communications. Since 1907, federal law has prohibited corporations from making contributions to federal candidates, and Congress subsequently expanded that ban also to cover corporate expenditures. These prohibitions were codified at 2 U.S.C. § 441b(a) in the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, and in the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (*MCFL*), this Court construed the statutory prohibition on corporate or union expenditures "in connection with" a federal election, 2 U.S.C. § 441b(a), to encompass only "express advocacy"—direct exhortations to support or oppose a candidate, such as "vote for" or "vote against." The Court's rationale in *MCFL* was based on its earlier discussion in *Buckley* v. *Valeo*, 424 U.S. 1, 40-43 (1976), where, in order to avoid constitutionally impermissible vagueness, this Court construed a statutory restriction

on expenditures "relative to" a candidate to include "only explicit words of advocacy of the election or defeat of a candidate."

This interpretation allowed corporations and unions to circumvent § 441b by using general treasury funds to finance sham "issue ads," aired just before an election, that criticized or praised candidates without using the prohibited "magic words" of express advocacy. Increasingly throughout the late 1990's, "[c]orporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA." *McConnell*, 540 U.S. at 127-128. The spenders claimed that such ads were intended only to address current issues—no matter how directly they implicitly promoted or attacked a candidate by name, and no matter how soon before the election they were broadcast to the candidate's electorate.

To remedy this widespread evasion of the nation's campaign laws, Congress enacted the "electioneering communications" provisions of BCRA. Those provisions supplemented the failed express-advocacy framework with a "bright line" definition of "electioneering communication[s]," which corporations and labor unions may not fund except through a separate segregated fund. Included within that definition are all communications that (i) are disseminated through broadcast, cable, or satellite, (ii) refer to a clearly identified candidate for federal office, (iii) are made within 30 days of a primary election or 60 days of a general election, and (iv) target the electorate of the identified candidate. 2 U.S.C. § 434(f)(3)(A).

The Court in *McConnell* upheld this measure as a constitutional way "to correct the flaws [Congress] found in the existing system." 540 U.S. at 194. The Court "easily answered" the question whether the government interests involved were compelling, noting that it had "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little

or no correlation to the public's support for the corporation's political ideas.'" *Id.* at 205 (quoting *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)); *McConnell*, 540 U.S. at 223-224 ("To say that Congress is without power to pass appropriate legislation to safeguard an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." (internal quotation marks omitted)).

The Court also concluded that BCRA's regulation of ads falling within the "electioneering communication" definition directly furthered those interests. Heeding the "unmistakable lesson of the record" before it, the Court credited Congress's determination that the express advocacy requirement was fatally underinclusive and "functionally meaningless." *McConnell*, 540 U.S. at 193-194.

> Not only can advertisers easily evade the line [between express advocacy and so-called "issue ads"] by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption.

Id. Although ostensibly addressed to pending legislative matters, the Court reasoned, "so-called issue ads" are "intended to influence the voters' decisions [in the candidate elections] and have that effect." *Id.* at 206. The Court therefore concluded that Congress "has a compelling interest in regulating" such ads, which are the "the functional equivalent of express advocacy." *Id.* at 205-206.

2. Because the "Crosssroads" Ad Directly Implicates Those Compelling Interests, the Electioneering Communication Provisions Are Narrowly Tailored As Applied to That Ad

The "Crossroads" ad exemplifies the type of ad that prompted Congress to enact, and this Court to uphold, BCRA's electioneering communication provisions. As applied to that ad, those provisions are therefore narrowly tailored to further the compelling government interests identified in *McConnell*.

Underlying *McConnell* was the recognition that although many purported "issue ads" "do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." 540 U.S. at 193. As an illustration, the Court explained that "Little difference exist[s] . . . between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. "Crossroads" is a real manifestation of that hypothetical ad: It condemns as "unfortunate" Senator Snowe's record on a particular issue—her failure to support a constitutional amendment banning same-sex marriage—and exhorts viewers to "call [Senator] Snowe . . . immediately" and tell her to change that position. J.S. at 4 n.3. It does not simply seek to affect Senator Snowe's future vote, but it also criticizes her past vote—and it broadcasts that criticism to her electorate during the period immediately preceding a federal election in which she is a candidate.

CCL argues that broadcast ads mentioning Senator Snowe could not have had any impact on voters' decisions because she was running unopposed in the Maine Republican primary. As the district court found, this is wrong for at least two reasons. First, such ads could have affected the size of the vote Senator Snowe received in the primary, which in turn could affect her fundraising and ultimate prospects in the general election. Second, advertising directed at Senator Snowe during the period before the primary would

have had a direct impact on voters' choices in the general election. As the district court noted, "the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection." J.S. App. 10a.

Because regulating the "Crossroads" ad thus directly furthers the compelling interests supporting BCRA, the district court did not abuse its discretion in concluding, based on the limited record before it on the motion for a preliminary injunction, that CCL is unlikely to succeed on the merits of its as-applied challenge.

B. CCL Cannot Demonstrate That It Would Suffer Irreparable Harm Without Injunctive Relief

1. The "electioneering communications" regulations afford CCL ample means of disseminating its message

The district court properly exercised its discretion to deny preliminary relief because CCL could not show that the application of BCRA to the "Crossroads" ad would cause it any significant harm, much less irreparable injury—a necessary prerequisite to any grant of interim relief. As this Court made clear in *McConnell*, BCRA imposes no bar on CCL's ability to engage effectively in so-called grassroots lobbying. To the contrary, that legislation leaves open ample means of disseminating lobbying communications to concerned citizens, and this Court determined in *McConnell* that those avenues fully protect the First Amendment interests of corporations like CCL.

a. CCL could easily have funded "Crossroads" through a PAC

Most obviously, CCL could have broadcast its proposed advertisement, without any alteration at all, on any radio or television outlet, at any time, simply by using a PAC to fund

the ads. See 2 U.S.C. § 441b(b)(2), 441b(c)(1). Indeed, given the record here, the funding of the "Crossroads" ad through a PAC would have been particularly easy to accomplish. The Jurisdictional Statement asserts that "[o]ne long-time donor has committed to paying the entire $3,992 cost of the radio buy so that the ads may be run for four weeks as scheduled. Heath Decl. 16." J.S. at 8. This amount is within the individual contribution limit to a PAC. 2 U.S.C. § 441a(a)(1)(C) ($5,000 annual limit). Thus, this one donor could have made his contribution directly to a PAC established by CCL, which would then have had all of the funds required to pay for the broadcast of the "Crossroads" ad in compliance with FECA.

CCL's ability to fund its proposed advertisements through a PAC precludes the as-applied challenge it now asserts. This Court has repeatedly held that the opportunity to use a PAC for election-related activity fully safeguards corporate and union First Amendment rights. *See, e.g.*, *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 668-669 (1990) (upholding rule that corporations must fund express advocacy with PACs); *FEC* v. *Beaumont*, 539 U.S. 146, 163 (2003) (upholding rule that corporations must fund campaign contributions with PACs). As this Court explained in *McConnell*:

> The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure, see [2 U.S.C.] §§ 432-434, without jeopardizing the associational rights of advocacy organizations' members.

540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163). The Court found no constitutional infirmity in requiring corporations and unions to pay for such ads from their PACs. Indeed, precisely because of the PAC option, this Court in *McConnell* rejected as "simply wrong" characterizations of

BCRA as a "complete ban" on speech. *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162).

The absence of irreparable injury here is particularly striking given CCL's representations in its complaint that it had no objection to limiting funding for the ads to dollars contributed by individuals and to complying with the reporting and disclosure obligations imposed by BCRA on PACs engaged in electioneering communications. Compl., ¶¶ 32, 60-62. CCL purported to object only to the requirement that it pay for the ads from a segregated fund that could not solicit contributions in excess of $5,000 and that could solicit only members. Id. ¶ 62. But in the circumstances of this case, where an individual came forward to fully fund the ads with a contribution of less than $5,000, these supposedly objectionable features of BCRA would not have limited its ability to run the ad and thus could not have harmed CCL.[6] In short, on the facts of this case, BCRA provided a mechanism for CCL to fund and run its proposed ad, subject only to requirements that even CCL did not contend were injurious to it; CCL simply chose not to avail itself of that option.

b. CCL could have disseminated its message consistent with FECA even if it insisted on drawing the necessary funds from its general treasury

Even though it chose not to channel the single donation for "Crossroads" into a PAC rather than its general treasury, CCL still retained other effective options for publishing

---

[6] Under the rules relating to PACs, that individual would have to be a member of CCL or among its executive personnel. 11 C.F.R. § 114.7(a); 11 C.F.R. § 114.5(g). Although CCL has not indicated whether the individual who agreed to fund the broadcast of "Crossroads" was among its members or executive personnel, CCL has stated that the individual has donated to CCL "a number of times" over more than a five-year period. Heath Dep., Ex. A to FEC Opp. to Mot. for Prelim. Inj., at 68. In any event, CCL's Executive Director testified that even if that individual did not come forward, the necessary funds could have been secured from other sources. *Id.* at 69-70.

its views without violating BCRA's electioneering communication regulations.

First, as this Court noted in *McConnell*, CCL could have disseminated its message at any time, in any outlet, and with any funds, "by simply avoiding any specific reference to federal candidates." 540 U.S. at 206. CCL could have, for instance, informed the public about the Marriage Protection Amendment by broadcasting its "Crossroads" ad exactly as drafted with the exception of the specific reference to Senator Snowe. Second, CCL could have used its general treasury funds to disseminate its advertisements identifying a federal candidate at any time, including close to an election, by publishing those ads in non-broadcast media such as newspapers or billboards. This ability to disseminate its message through non-broadcast alternatives provided ample opportunity to reach a mass audience without triggering the electioneering communications requirements. Third, CCL could have broadcast ads that referred to Senator Snowe by name outside the statutory pre-election windows. Such ads would not have been electioneering communications under BCRA and thus could have been funded from CCL's general treasury funds even if outside business corporations had made contributions to it.

As the district court correctly concluded, the ready availability of these effective alternative means fatally undermined CCL's allegations of irreparable injury.

2. The record in this case casts significant doubt on CCL's basis for seeking a preliminary injunction

CCL's attempt to establish irreparable injury fails for another reason: the record strongly suggests that CCL planned to run the "Crossroads" ad precisely in order to trigger—and then to challenge—FECA's electioneering communication requirements. As explained above, *see supra*, at 4-5, discovery revealed that this case had its genesis in an email in which counsel sought a plaintiff for a test case challenging the application of BCRA to ads involving the Marriage Amendment, and that CCL immediately re-

sponded and filed suit within ten days despite having raised no funds for the ad, having done nothing to produce it or to arrange for its airing, and having no definite plans about when, where, or how often the ad might run.

In short, the record casts significant doubt on CCL's claim that the "electioneering communication" provisions threatened any genuine "grassroots lobbying" efforts. By all indications, CCL had no intention to engage in such communications before counsel, through Focus on the Family, offered its legal services in generating this as-applied test case. In these circumstances, the district court plainly did not err in concluding that CCL had failed to establish irreparable injury.

C. Granting CCL's Preliminary Injunction Would Substantially Injure Other Parties and Disserve the Public Interest

Setting aside a duly enacted Act of Congress—even for a short period of time—substantially injures both the government and the public, the beneficiary of that law. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). That burden is particularly significant in this case, where the governmental interests the statute serves are compelling. As this Court has noted, "to say that Congress is without power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *McConnell*, 540 U.S. at 223-224 (quoting *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934)). The exemption for "grassroots lobbying" that CCL's suit contemplates would directly undermine this compelling interest and effectively re-open the pre-BCRA loophole that allowed corporations and unions to fill the airwaves with electioneering ads funded from their general treasuries.

CCL's proposed injunction would also undermine Congress's compelling interest in clarity and consistency, one of

the key considerations motivating BCRA's "bright line" definition of electioneering communications. It was, after all, principally a concern for clarity that first led this Court to adopt the "express advocacy" test as a gloss on FECA's language. *Buckley*, 424 U.S. at 40-44, 79-80. After twenty-five years' experience, that test proved overly susceptible to manipulation and therefore incapable of serving its intended purpose. In crafting a remedy, Congress heeded this Court's admonitions concerning vagueness, and provided a new "bright line" test that was better tailored to capture campaign-related speech.

CCL's proposed relief would vitiate that interest by effectively creating a broad and ill-defined judge-made exemption for "grassroots lobbying," a potentially boundless category subject to exploitation by corporate and union spenders seeking the same kind of "as applied" relief from the statute based on assertions that their ads similarly intend to influence legislation rather than elections.

To accept this invitation is to undermine the heart of Title II—the clarity and certainty of the "bright line" test it provides. In the name of "grassroots lobbying," CCL proposes to reintroduce uncertainty into the statute, replacing BCRA's bright-line definition with *ad hoc* judicial determinations that carve out exceptions to the otherwise clear standards Congress provided. Both Congress and this Court have rejected this approach. Clarity and certainty are themselves a valuable public interest in laws that touch on speech, and the relief CCL seeks would disserve that interest.[7]

---

[7] The decision of the three-judge court was also plainly correct to the extent it denied CCL's request for "a preliminary injunction, unlimited time-wise, that would encompass 'any electioneering communications by [the League] that constitute grass-roots lobbying.'" J.S. App. 3a n.1; *see supra*, at n.2. CCL could not possibly establish the required showings for emergency relief with respect to hypothetical advertisements of undefined content, particularly where CCL does not allege any present intent to broadcast such ads and offers no indication about the circumstances in

CONCLUSION

For the above reasons, this Court should dismiss this appeal as moot, or in the alternative, summarily affirm the decision of the three-judge court denying CCL's motion for a preliminary injunction.

Respectfully submitted,

ROGER M. WITTEN
DAVID A. O'NEIL
WILMER CUTLER
PICKERING HALE
AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
RANDOLPH MOSS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

Additional Counsel Listed On Inside Cover

AUGUST 2006

---

which they might appear. Accordingly, as the district court concluded, such a "broader preliminary injunction is unwarranted." J.S. App. 3a n.1.

Supreme Court, U.S.
FILED
AUG 18 2006
OFFICE OF THE CLERK

No. 05-1447

In The
Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., *Appellant,*
v.
FEDERAL ELECTION COMMISSION, ET AL., *Appellees.*

On Appeal from the United States District Court
for the District of Columbia

Brief Opposing Motion to Dismiss or Affirm

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Raeanna S. Moore
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Lead Counsel for Appellant

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY
LLP
600 Thirteenth Street, NW
Washington, DC 20005-3096
202/756-8000
202/756-8087 (facsimile)
Counsel for Appellant

August 2006

Corporate Disclosure Statement

The Christian Civic League of Maine, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

Table of Contents

Corporate Disclosure Statement ..... (i)

Table of Contents ..... (ii)

Table of Authorities ..... (iii)

Argument 1

I. Preliminary Injunctions Are Necessary. 2

II. Preliminary Injunctions Are Not Precluded. 3

III. The Mootness Exception Is Not Precluded. 5

Conclusion 10

Table of Authorities

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 3

American Library Ass'n v. Reno, 308 U.S. App. D.C. 233 (D.C. Cir. 1994) 4

American Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992) 9

Arizona Right to Life PAC v. Bayless, 320 F.3d1003 (9th Cir. 2003) 9

Arkansas Right to Life PAC v. Butler, 146 F.3d 558 (8th Cir. 1998) 3

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 3, 9

California Pro-Life Council v. Getman, 328 F.3d 1088 (9th Cir. 2003) 5, 9

Chamber of Commerce v. FEC, 69 F.3d 600 (D.C. Cir. 1995) 9

Doe v. Bolton, 410 U.S. 179 (1973) 3

Dombrowski v. Pfister, 380 U.S. 479 (1965) 3

Faucher v. FEC, 743. F. Supp. 64 (D. Me. 1990) 2

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 5

Florida Right to Life v. Lamar, 273 F.3d 1318 (11th Cir. 2001) 5

Kansans for Life v. Gaede, 38 F. Supp. 2d 928 (D. Kan. 1999) 5

Los Angeles v. Lyons, 461 U.S. 95 (1983) 5

Majors v. Abell, 317 F.3d 719 (7th Cir. 2003) 5

McConnell v. FEC, 540 U.S. 93 (2003) 1, 3, 4

Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129 (8th Cir. 1997) 3

Navegar Inc. v. United States, 103 F.3d 994 (D.C. Cir. 1997) 9

New Hampshire Right to Life PAC v. Gardner, 99 F.3d 8 (1st Cir. 1996) 3, 5

Norman v. Reed, 502 U.S. 279 (1992) 5

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 5

Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993) 3

Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998) 1

Roe v. Wade, 410 U.S. 113 (1973) 6, 7

San Francisco County Democratic Central Comm. v. Eu, 826 F.2d 814 (9th Cir. 1987) 3

Stewart v. Taylor, 104 F.3d 965 (7th Cir. 1997) 5

Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568 (1985) 3

Virginia Soc'y for Human Life v. FEC, 263 F.3d 379 (4th Cir. 2001) 5

Wisconsin Right to Life v. FEC, 126 S. Ct. 1016 (2006) . 1, 4

Constitution, Statutes, Regulations & Rules

28 U.S.C. § 1253 1

Fed. R. Civ. P. 65 2

U.S. Const. amend. I ..... *passim*

Other Authorities

13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3532.5 (1984) 9

Argument

Just as Defendants argued in *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL*"), that this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), precluded all as-applied challenges to the electioneering communication prohibition, Defendants now argue that *McConnell* precludes all preliminary injunctions in as-applied challenges to the prohibition. And the district court's analysis, if allowed to stand, would make it impossible to obtain injunctions whenever First Amendment liberties are deprived (not only in as-applied challenges to the electioneering communication prohibition).[1]

Whether preliminary injunctions are permitted is a substantial question of great public importance because preliminary injunctions are essential to protect First Amendment liberty, and in many cases (such as the present one) a denial of a preliminary injunction determines whether the ability to speak at a crucial moment will be forever lost. The fact that a preliminary injunction was denied does not make this case less worthy of review. Rather, this case is important precisely because it does involve a preliminary injunction.[2]

---

[1]This Court is the only one with an opportunity to review the district court's analysis. 28 U.S.C. § 1253. Until January 1, 2007, the D.C. District is the only one that may hear challenges to the electioneering communication prohibition. 116 Stat. 114 (BCRA § 403(a)(1) and (d)(1)). It should be noted that other circuits employ a different preliminary injunction analysis than used here. *See, e.g., Roe v. Anderson,* 134 F.3d 1400, 1402 (9th Cir. 1998) (sliding scale).

[2]This case also provides a varied fact pattern from *WRTL*, 126 S. Ct. 1016, which this Court remanded with instructions for the district court to decide on the merits whether an exception is constitutionally required for genuine grassroots lobbying. Briefing on cross motions for summary judgment in *WRTL* was completed on August 18 and the case should be decided shortly. It is highly likely that *WRTL* will soon be before this Court, and by considering the cases together the Court can also consider the added

I. Preliminary Injunctions Are Necessary.

The federal rules provide for preliminary injunctions for a good reason, which is not always to preserve the status quo. Fed. R. Civ. P. 65. Preliminary injunctions are often essential to protect legal rights. Where there is a dispute over ownership of an historic building that is about to be demolished, a preliminary injunction is vital to preserve the status quo until ownership can be established. If the ultimately proven owner wanted the building preserved, her legal victory would be hollow if during litigation the building was demolished.

Where a law abridging First Amendment rights of free expression and petition is involved, there is also a valuable thing that can be destroyed during litigation, namely a timely moment to speak and petition. Where citizens participate in self-government by petitioning their representatives on imminent legislative or executive branch matters, the time before the pending action is crucial. If the people's rights are abridged at that crucial time, the opportunity is forever lost. The preliminary injunction decision effectively decides the whole case. In such situations, preliminary injunctions cannot merely preserve the status quo (understood here to mean that the law is given effect) because doing so would render the constitutional guarantees a nullity. Rather, preliminary injunctions must be available to protect the prior status quo, i.e., the situation before the law was enacted and only the First Amendment was in effect ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to . . . petition the Government . . . .").

Preliminary injunctions have been used in election law cases to preserve the people's rights. For example, in *Faucher v. FEC*, 743. F. Supp. 64 (D. Me. 1990), *aff'd*, 928 F.2d 468

---

facts of the present case, e.g., the candidate named in the communications was unopposed, the League had no PAC, etc.

(1st Cir. 1991), *cert. denied*, 502 U.S. 820 (1991), the district court set a hearing on the motion for preliminary injunction, and at that time consolidated the preliminary injunction hearing with the hearing on the merits, deciding that the FEC's regulations that restricted Maine Right to Life's ability to publish voter guides were unconstitutional. Had the Defendants' present status-quo-governs argument prevailed, the people's liberty would have been violated.[3]

II. Preliminary Injunctions Are Not Precluded.

Defendants and the district court believe that *McConnell* precludes preliminary injunctions by eliminating irreparable harm because the PAC option is always available (as are use of alternative media etc.). FEC Motion at 22-23. This is simply a

---

[3]The Defendants not only try to eliminate preliminary injunctions. They try to eliminate preenforcement challenges, implying that the League should simply have violated the law in order to maintain its claim. FEC Motion at 14-15 ("chose not to run the . . . advertisement"). But Defendants ignore the controlling fact that we deal here with the First Amendment, and this Court has never allowed the people's vital expression and petition rights to be so trampled upon."When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)) (cases collected). *See also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 69-71(1993); *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581-82 (1985); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). *Cf. San Francisco County Democratic Central Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987) (en banc) ("This is especially true in a First Amendment case because of 'the sensitive nature of constitutionally protected expression.'" *Id.* (quoting *Dombrowski v. Pfister*, 380 U.S. 479 (1965)); *Arkansas Right to Life PAC v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997); *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996).

reassertion, in new costume, of the argument that the same alternative options precluded as-applied challenges, which argument this Court unanimously rejected in *WRTL*, 126 S. Ct. 1016. But unless corrected, the district court's holding would mean that no plaintiff could ever obtain a preliminary injunction in an as-applied challenge to the electioneering communication prohibition because there could never be any irreparable harm.

The same is true as to the district court's holdings that the FEC would be harmed because it could not enforce the electioneering communication and that the public would be harmed because the law would not be enforced. Where do constitutional guarantees of liberty fit into such an analysis? Any time a free speech abridgment is challenged on constitutional grounds and a preliminary injunction is sought, the injunction will have the effect of stopping the FEC from enforcing the law and there will be a public law not being enforced. So obtaining a preliminary injunction is precluded under such broad rationales. And these broad rationales reach beyond the context of as-applied challenges to the electioneering communication prohibition. They would preclude constitutional challenges to any law enforced by any governmental authority.[4]

---

[4]As to the likelihood of success on the merits, the district court also abused its discretion by relying on rationales already asserted as precluding as-applied challenges and rejected by this Court in *WRTL*, 126 S. Ct. 1016, e.g., the need for a prophylactic bright line, the availability of the PAC option (and other options), and some possible minimal effects on elections from genuine grassroots lobbying. (The effects on the election that the district court suggested might result from the Crossroads ad were particularly minimal – at a level that should not be cognizable in constitutional review.) The district court ignored its own *McConnell* record as to the existence of "genuine issue ads," which this Court recognized as a distinguishable, presumably protected category. *McConnell*, 540 U.S. at 206 n.88. Defendants rely on a presumption that an act of Congress is constitutional, which has no place where First Amendment rights are abridged. *American Library Ass'n v. Reno*, 308 U.S. App. D.C. 233 (D.C. Cir. 1994) ("'Content-based

This Court is the only court that will have the opportunity for appellate review of these serious analytical errors of the district court. Unless this Court corrects the error, preliminary injunctions are precluded in this district court.

III. The Mootness Exception Is Not Precluded.

Defendants and the district court are even trying to preclude the exception to the mootness doctrine for matters that are capable of repetition yet evade review. Election cases are classic examples of this exception to the mootness doctrine.[5]

Yet the lower court expressed concern that "the 'Crossroads' advertisement portion of the case," specifically, does not qualify under the "capable of repetition yet evading review" exception to mootness because that ad is not capable of repetition. June 23, 2006 Order at 1. But what must be "capable of repetition" to fit within the exception to mootness is not the running of the Crossroads ad itself: "the capable-of-repetition doctrine applies . . . only where the named plaintiff can make a reasonable showing that he will again be *subjected to the alleged illegality*." *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (emphasis added). It is the alleged illegality or injury that must be capable of repetition, not the specific scenario giving rise to the complaint.

---

regulations are presumptively invalid.'" (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992))). Strict scrutiny is the antithesis of a presumption of constitutionality.

[5]*See Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 390 n.3 (4th Cir. 2001); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir.1997); *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 18 (1st Cir.1996); *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).

A classic example is found in *Roe v. Wade*. 410 U.S. 113 (1973). The claims of Jane Roe and the class she represented would have been moot if the particular pregnancy she experienced when filing her claim in March 1970 had to be "capable of repetition." Indeed, the state made exactly this argument, pointing out that "she and all other members of her class are no longer subject to any 1970 pregnancy." 410 U.S. at 125. But it was not the specific pregnancies giving rise to the suit that met the requirements of the mootness exception. The claims were not moot because the restrictions remained in force and "[p]regnancy often comes more than once to the same woman," *id.* at 125, so it was reasonably likely that Roe would again be subjected to the challenged restrictions.

Likewise, the League need not show that the Crossroads ad itself is capable of repetition. It only needs to show a reasonable likelihood that it would again be subjected to the electioneering communication prohibition.[6] So when the League says that it wants to run materially similar ads in the future and shows that there is a reasonable likelihood of the ads coinciding with a prohibition period, it has met its burden of showing the

---

[6]While the June, 2006 Senate vote on the Marriage Protection Amendment (S.J. Res. 1) is past, the League intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period. VC ¶ 16. In addition to ongoing debate over a federal amendment protecting traditional marriage, the League has an interest in grass-roots lobbying as to a broad range of currently hot social issues that the legislative and executive branch often deal with in periods before elections, including partial-birth abortion, permissive abortion, abortion clinic regulations, parental control of their children's education, regulation of sexual predators, legislation normalizing same sex relations, gambling, limiting the government's power to raise taxes and the freedom to advance its issues in the public forum. *Id.* This list provides sufficient notice of the subject matter of future materially-similar ads, and the abundance of these issues increases the likelihood that the League will again be forced to withdraw an ad that it would otherwise broadcast.

"capable of repetition" prong of the exception.[7] The issue is not whether planned future ads are ripe for review because the plan for future ads goes to the question whether there is a reasonable likelihood that the situation is "capable of repetition."

Defendants try to dodge this straightforward application of the mootness exception by ignoring its normal operation and trying to create an endless loop of mootness and unripeness, effectively eliminating the exception to the mootness doctrine and denying the League its day in court. Defendants' strategy is to argue that such claims are never appropriate for preliminary injunction and resist expedition. Then they launch the endless loop by arguing that (1) the case is moot the moment the prohibition period ends or the legislative vote has passed and (2) any plans for materially-similar future ads in similar circumstances are never ripe for adjudication.

In the first step of the loop of this case, the FEC admits that unless judicial review is "highly expedited," the question of a preliminary injunction in a challenge to the electioneering communication prohibition will become moot before it can be fully litigated. *See FEC Opposition to Appellant's Motion to Expedite and Consolidate Briefing* (Filed May 15, 2006) at 5. Yet it argues against expedition on the basis that more suitable relief is available, i.e., a hearing "before the district court, perhaps following further factual development or proceedings."

---

[7]Claims regarding pregnancies and elections both tend to evade review because the normal period of pregnancy, elections, and legislative votes "is so short that [they] will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy [and election-related] litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Roe*, 410 U.S. at 125. Moreover, as shown in text, Defendants are overtly attempting to evade review by opposing expedition, attempting to preclude preliminary injunctions, and arguing their endless loop of mootness and unripeness.

Id.[8] But elsewhere Defendants have argued, and the lower court has suggested, that once the time for running a specific grass-roots lobbying ad is past, the question of the constitutionality of the electioneering communications prohibition with respect to that particular ad is moot, and, further, that the question of its application is not ripe with respect to any future ads.

On June 23, 2006, the district court ordered Plaintiff to "show cause . . . why the 'Crossroads' portion of this case should not be dismissed as moot" and Defendants to address "the mootness of the 'Crossroads' portion of the case." *CCL v. FEC*, Civil Action No. 06-0614 (Docket # 41). In response, (Docket # 46) the FEC argued that because "CCL no longer has any plans to run the 'Crossroads' advertisement it allegedly intended to air from May 10 through early June 2006" and "currently has no specific plans to run any grassroots lobbying advertisements between now and election day," "the issue whether it was constitutional to apply the electioneering communication provision to the Crossroads advertisement . . . is no longer an actual, ongoing controversy." *FEC Mem. Responding to June 23 Order* at 2 (*CCL v. FEC*, Civil Action No. 06-0614 (Docket # 46)). Completing the loop, on June 12 Defendants moved for dismissal of the League's claims "regarding broad classes of future, hypothetical 'grass-roots lobbying,' specifically all communications beyond the 'Cross-roads' advertisement . . . . [because s]uch claims are not ripe, and are too speculative and hypothetical to be justiciable under Article III." *FEC Motion to Dismiss Plaintiff's Claims* at 1 (*CCL v. FEC*, Civil Action No. 06-0614 (Docket # 37)).

Taken together, these positions mean that when the League learns that Congress has scheduled a vote on an issue of interest

---

[8]The "further factual development" the FEC envisions, in addition to the discovery it has already conducted, is in fact, extensive and intrusive and is not limited to factual issues. *Id.* at 9-10.

during a prohibition period, the League must either plan to violate the law or seek preliminary injunctive relief. When preliminary relief is inevitably denied, the League's claim is considered moot. It cannot invoke the exception for matters capable of repetition yet evading review (in order to protects its rights for the next time it runs ads) be ause the same ad won't be run again and its plans to run future ads are not deemed ripe. So it is ever waiting for the proper time for review of its claim, but never qualifying for it. This endless loop is cobbled from misconstructions of the ripeness doctrine[9] and the "capable of

---

[9]As to ripeness, in a pre-enforcement challenge to a law threatening prosecution for First Amendment activities, an injured party has standing and the action is ripe for adjudication if there is a credible threat of enforcement. *Navegar Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) ("[S]uch threats of enforcement can simultaneously ripen a preenforcement challenge and give the threatened party standing." (citing *Babbitt*, 442 U.S. at 298-99; *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196 (D.C. Cir. 1992); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3532.5 (1984). *See also California Pro-Life Council, Inc. v. Getman*, 328 F.3d at 1093-94 (where intended communication was arguably subject to California reporting and disclosure requirements, it was a cognizable injury establishing standing, and because the organization suffered an injury as a result of an allegedly unconstitutional statute its claim was ripe); *Arizona Right to Life PAC v. Bayless*, 320 F.3d1003, 1007 n. 6 (9th Cir. 2003) (noting in a similar context that finding that the plaintiff has suffered a harm "dispenses with any ripeness concerns"). In a preenforcement challenge of a law that arguably violates the First Amendment, unless the threat of enforcement is not credible, the plaintiff has standing and the controversy is ripe.

The electioneering communication prohibition is plainly applicable to the Crossroads ad and any similar "targeted" broadcast ad aired during the prohibition periods. Moreover, as was pointed out in *Chamber of Commerce v. FEC*, enforcement of FECA provisions can be initiated by private party complaint and FEC refusal to enforce may be challenged by a private party. 69 F.3d 600, 603 (D.C. Cir. 1995); 2 U.S.C. § 437g(a)(8). "Therefore, even without a[n FEC] enforcement decision, [the League is] subject to litigation challenging the legality of [its] actions . . . ." *Id.* Contrary to the FEC view, claims such as the League's are almost *always* ripe.

repetition yet evading review" exception to the mootness doctrine.

But as noted before, the League's plan to run materially-similar ads in the future is not the basis of the present constitutional challenge. The Crossroads ad is the basis of the present challenge. The challenge is not moot because of the exception to the mootness doctrine for matters capable of repetition yet evading review. The League's desire to do materially-similar future ads, coupled with its wide range of interests and the regular recurrence of elections, demonstrates a reasonable likelihood that this situation will arise again. So this case is not moot, and ripeness is not even at issue.

Conclusion

The motions to dismiss or affirm should be denied. Probable jurisdiction should be noted and briefing ordered as requested in the Jurisdictional Statement.

Respectfully submitted,

M. Miller Baker
Michael S. Nadel
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005
202/756-8000
202/756-8087 (facsimile)
Counsel for Appellant

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Raeanna S. Moore
Jeffrey P. Gallant
Bopp, Coleson & Bostrom
The James Madison Center for Free Speech
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Lead Counsel for Appellant